In The

Supreme Court of the United States

October Term, 1995

WILLIAM J. JANKLOW, GOVERNOR,
AND MARK W. BARNETT, ATTORNEY GENERAL,
IN THEIR OFFICIAL CAPACITIES,

Petitioners,

v.

PLANNED PARENTHOOD, SIOUX FALLS CLINIC,
BUCK J. WILLIAMS, M.D., AND
WOMEN'S MEDICAL SERVICES, P.C.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

MARK W. BARNETT
Attorney General
State of South Dakota
Counsel of Record

JOHN P. GUHIN
JANINE KERN
Deputy Attorneys General
500 East Capitol
Pierre, SD 57501-5070
Telephone (605) 773-3215
Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

WHETHER *UNITED STATES v. SALERNO* CONTINUES TO APPLY TO FACIAL CHALLENGES TO ABORTION LAWS?

WHETHER THE CONSTITUTION REQUIRES A ONE-PARENT NOTICE OF ABORTION STATUTE TO CONTAIN A JUDICIAL BYPASS MECHANISM, WHERE THE NOTICE REQUIREMENT IS WAIVED FOR A BROADLY DEFINED CLASS OF "ABUSED AND NEGLECTED" MINORS?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES CITED:

TABLE OF AUTHORITIES – Continued

Page

STATUTORY REFERENCES:

The Petitioners, William J. Janklow, in his official capacity as Governor of the State of South Dakota, and Mark W. Barnett, in his official capacity as Attorney General of the State of South Dakota, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on August 31, 1995.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 63 F.3d 1452 (8th Cir. 1995) and is reprinted in the Appendix. (App. at 1.)

The Memorandum Opinion of the United States District Court for South Dakota is reported at 860 F.Supp. 1409 (D.S.D. 1994). It is reprinted in the Appendix. (App. at 51.)

JURISDICTION

The jurisdiction of the United States District Court for the District of South Dakota was found to exist pursuant to 28 U.S.C. § 1331.

The jurisdiction of the court of appeals was invoked pursuant to 28 U.S.C. § 1291. On appeal by Petitioners and cross-appeal by Respondents, the United States Court of Appeals for the Eighth Circuit, on August 31, 1995, entered a judgment affirming the judgment of the district court. No petition for rehearing was sought.

This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Eighth Circuit under 28 U.S.C. § 1254(1).

CONSTITUTIONAL OR STATUTORY PROVISIONS INVOLVED

Due Process Clause of the Fourteenth Amendment to the United States Constitution.

> No state shall . . . deprive any person of life, liberty or property, without due process of law. . . .

SDCL 34-23A-7. App. at 83.

SDCL 26-8A-2. App. at 84.

STATEMENT OF THE CASE

During the 1993 legislative session, the South Dakota Legislature enacted SL 1993, ch. 249, codified at SDCL ch. 34-23A. About two weeks before the effective date of the act, Planned Parenthood was granted an ex parte TRO. App. at 39. The parties agreed to an extension of the order pending the outcome of the litigation.

The lawsuit attacked the provisions of the South Dakota statute designed to protect minors facing an abortion decision. SDCL 34-23A-7, App. at 83, requires the doctor to notify one parent (or guardian) of the impending operation on the unemancipated minor forty-eight hours before the abortion. No judicial bypass is provided. The notice requirement is waived by statute in the case of medical emergency,

if the person entitled to notice certifies it has been given, or if the minor provides information to the attending doctor that she is an "abused or neglected child" as broadly defined by SDCL 26-8A-2; App. at 84, and the abuse is properly reported. The "abuse and neglect" exception allows an abortion to be performed without notice to either parent if the child has been abandoned, has been subject to mistreatment or abuse, has lacked proper parental care, whose environment is injurious to her welfare, whose parent failed or refused to provide for her necessary subsistence, supervision, education or medical care, who is homeless, who is threatened with substantial harm, who has sustained emotional harm or mental injury, or is subjected to sexual abuse, molestation or exploitation by the parent or guardian. *Id.*

The district court, on summary judgment, struck down the one-parent notice provision. The court noted that the one-parent notice was "less restrictive upon the abortion decision than the statute considered in *Hodgson*" but held that it was immaterial whether there was a "one-parent or a two-parent notice provision." App. at 64. Without making any specific factual findings on the issue, the court found that the omission of the bypass constituted an "undue burden on the minor's privacy right to make the abortion decision." App. at 64. The district court also found that the exemption from the notice requirement for "abused and neglected children" set out at SDCL 26-8A-2 did not save the statute. App. at 64-66.

The court of appeals affirmed "in all respects."[1] App. at 2. The court of appeals first examined the appropriate

[1] The district court also upheld the informed consent provisions of the state statute, App. at 71-74, but struck down the civil

"standard for a challenge to the facial constitutionality of an abortion law." App. at 9. The court acknowledged that the circuit courts "have split on the question of whether *[Planned Parenthood v.] Casey*[, 112 S.Ct. 2791 (1992)], effectively overruled [*United States v.*] *Salerno*[, 481 U.S. 739 (1987),] for abortion cases." App. at 10. The court noted that "the standard we choose to follow today may well determine the outcome of this case." App. at 11. The court ultimately found that *Salerno* had been effectively overruled "for facial challenges to abortion statutes" and applied the "*Casey* standard" to the parental notice provisions of South Dakota law. App. at 12.

The court further recognized that the "Supreme Court has yet to decide whether a mature or 'best interest' minor is unduly burdened when a State requires her physician to notify one of her parents before performing the abortion." App. at 16.

The court nonetheless struck down the statute both with regard to "best interest" and "mature" minors. The court's analysis was generally based upon the theory that one-parent notice statutes are the rough equivalent of consent statutes. *See* App. at 16; *id.* at 17, citing *Bellotti v. Baird*, 443 U.S. 622, 643-644 (1979). Likewise, the Court, in effect, asserted the equivalency of a one-parent and two-parent statutes. *See* App. at 17, 24, n.10.

---

and criminal liability sections of the statute, App. at 68-71, 74-76. These determinations were upheld on appeal, App. at 35-36, 27-35. None of these questions are before this Court on this Petition.

More specifically, with regard to so-called "mature" minors, the court essentially applied the *Casey* holding striking down a *spousal* notice requirement to a *single parent* notice requirement. App. at 16, 23.

As to "immature" or "best interest" minors, the court of appeals rejected South Dakota's assertion that the exception for abused and neglected minors satisfied any need for a judicial bypass procedure. South Dakota's abortion law allows a doctor to perform an abortion on a minor if she provides information that any one of the broad exceptions set forth in SDCL 26-8A-2 (App. at 84) is present.

The court held that the doctor who would perform the abortion is not a " 'neutral and detached agency' " and therefore does not qualify as an independent decision maker. App. at 22. The court also held that the bypass fell short of protecting the confidentiality of the "abused and neglected" minor's decision to have an abortion. App. at 20-21. The court thus failed to credit the effectiveness of the extensive procedures to guarantee confidentiality as set out by statute, by the Department of Social Services and by the Attorney General's Office.

The court also rejected the State's contention that Planned Parenthood had failed to demonstrate that the statute imposed an undue burden on a large fraction of affected minors. App. at 23-25. No statistics were cited by the court.

The court of appeals drew special attention to minors who had been sexually abused and noted that they might not be able to use the exceptions provided by the "abuse and neglect" statute. *Id.* at 24-25. The court impliedly

rejected the State's argument that, if the sexual abuse is the reason justifying an abortion in a *judicial* procedure, and if the minor cannot talk about that sexual abuse, then the child would not obtain an abortion through a judicial procedure in any event. More importantly, the court ignored the State's argument that sexual abuse is certainly more easily revealed to a doctor in private, under the challenged statute, than to a judge in a judicial setting.

REASONS FOR GRANTING THE WRIT

I

THE EIGHTH CIRCUIT COURT OF APPEALS HAS DETERMINED AN IMPORTANT QUESTION OF FEDERAL LAW – i.e. WHETHER *UNITED STATES V. SALERNO* CONTINUES TO APPLY TO FACIAL CHALLENGES TO ABORTION LAWS – IN CONFLICT WITH THE FIFTH CIRCUIT COURT OF APPEALS.

Prior to *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S.Ct. 2791 (1992), this Court had applied the test set out in *United States v. Salerno*, 481 U.S. 739 (1987), to facial challenges to abortion laws. *See Rust v. Sullivan*, 500 U.S. 173, 183 (1991); *Webster v. Reproductive Health Services*, 492 U.S. 490, 524 (1989) (O'Connor, J.).

The decisions of the circuit courts subsequent to *Casey* have "split on the question whether *Casey* effectively overruled *Salerno* for abortion cases." App. at 10. The Third Circuit believes that *Salerno* has been overruled, *see Casey v. Planned Parenthood*, 14 F.3d 848, 863 n.21 (3rd Cir. 1994) (on remand) (dicta). The Fifth Circuit has

refused to "interpret *Casey* as having overruled, *sub silentio*, longstanding Supreme Court precedent governing challenges to the facial constitutionality of statutes," *Barnes v. Moore*, 970 F.2d 12, 14 n.2 (5th Cir.), *cert. denied*, 113 S.Ct. 1656 (1992), and that Circuit "continues to apply the *Salerno* standard." App. at 10. The Eighth Circuit Court of Appeals has been uncertain. In *Fargo Women's Health Organization v. Schafer*, 18 F.3d 526, 529 (8th Cir. 1994), the court stated that if the Joint Opinion in *Casey* wanted to depart from the *Salerno* standard, "we believe they would have specifically stated that the standard did not apply." In the present litigation, however, the circuit panel found that *Salerno* had been overruled. Similarily, Justices O'Connor and Souter found in their concurrence to the Memorandum Decision in *Fargo Women's Health Organization v. Schafer*, 113 S.Ct. 1668 (1993), that *Salerno* had been undermined.

The importance of resolving the issue is clear. As the court of appeals recognized, "the standard we choose to follow today may well determine the outcome of this case." App. at 11. Indeed, the court points out that "circumstances [do] exist under which the South Dakota law would be constitutional. . . . " *Id.* It follows that the result in this case *would* be different if *Salerno* controls.

II

THE QUESTION OF WHETHER A JUDICIAL BYPASS IS REQUIRED IN A SINGLE-PARENT NOTICE STATUTE IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT WHICH SHOULD BE, SETTLED BY THIS COURT.

In *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 510 (1990) (*Akron II*), this Court stated

> we have not decided whether parental notice statutes must contain such [bypass] procedures.

The question remains unanswered to this day, as explicitly recognized by the court of appeals, App. at 16. This case raises that issue in the context of the least intrusive notice statute – that is, one requiring notice to only one parent.

A. The issue has national importance.

Not only is the case of one of first impression, but it has national importance. State legislatures are the classic laboratories of democracy. To function properly in an area which touches on constitutional rights, questions such as are raised in this case should be decided by this Court so as to give the legislatures the necessary judicial guidance.

Furthermore, although Petitioner South Dakota is presently the only state with a single-parent notice statute with no judicial bypass, it can be safely assumed that other states would carefully consider this option were it deemed to be constitutionally available. This follows because the only other options – ignoring the moral and ethical challenge of the abortion decision or adopting a

judicial bypass – are so plagued with difficulties. Ignoring the challenge is considered irresponsible by many state legislatures. But adopting a statute with a judicial bypass carries with it very heavy costs as set out in this Court's opinion in *Hodgson v. Minnesota*, 497 U.S. 417 (1990).

Hodgson cited, as accurate, the analysis of the district court that the judicial bypass was a trying emotional experience with substantial negative impacts:

> The court experience produced fear, tension, anxiety, and shame among minors, causing some who were mature, and some whose best interests would have been served by an abortion, to 'forego the bypass option and either notify their parents or carry to term.'

Hodgson, 497 U.S. at 441-442.

Moreover, the *Hodgson* court recognized that, of the judges who had heard ninety percent of the petitions, "none of them identified any positive effects of the law." *Hodgson*, 497 U.S. at 441. Indeed, the process can be accurately identified as a judicial "rubber stamp." *See Hodgson v. Minnesota*, 648 F.Supp. 756, 766 (D.Minn. 1986); Affidavit of Dr. Lyons at Exhibit C, Table 1.

B. The litigation raises basic questions relating to the relationship between a parent and child.

This Court has long recognized the strength of the parent-child relationship in the law. In *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 166 (1944), the Court stated:

> It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.

Lassiter v. Dept. of Social Services, 452 U.S. 18 (1981), demonstrates the strength of that relationship in a context analogous to that at issue here – the loss of custody of a child. In *Lassiter*, 452 U.S. at 27, the Court said that its decisions had

> by now made plain beyond the need for multiple citation that a parent's desire for and right to 'the companionship, care, custody, and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'

The Court noted the "commanding" interest in the "accuracy and justice of the decision to terminate his or her parental status." *Id.* An important branch of that status – the knowledge of a child's consideration of an abortion – is at stake in this litigation.

Similarly, in *Hodgson*, 497 U.S. at 446, Justices Stevens and O'Connor found that

> the family has a privacy interest in the upbringing and education of children and the intimacies of the marital relationship which is protected by the Constitution against undue state interference.

Finally, Justice Kennedy, Chief Justice Rehnquist, Justices Scalia and White quoted *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972), at *Hodgson*, 497 U.S. at 484, to the effect that:

> 'This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.'

It follows that the issues raised by this Petition are of national interest because they significantly impact the legal nature of the parent-child relationship and likewise impact the state's ability to enhance that relationship.

III

THE DECISION OF THE COURT OF APPEALS CONFLICTS, IN PRINCIPLE, WITH PRIOR DECISIONS OF THIS COURT WHICH ESTABLISH THAT THE "RATIONAL RELATIONSHIP" TEST SHOULD BE USED IN TESTING NOTICE STATUTES.

In *Hodgson*, a majority of the Court found that the "rational relationship" test should be used in testing parental notice statutes. In particular, Chief Justice Rehnquist, along with Justices Kennedy, Scalia and White indicated adherence to the rational relationship test with regard to the two-parent notice statute. *Hodgson*, 497 U.S. at 490, 496, 500-501. Furthermore, Justice Stevens in his opinion for the Court clearly adopted the "rational relationship" test when he effectively identified the issue as whether the two-parent notice statute would "reasonably further any legitimate state interest." *Hodgson*, 497 U.S. at 450. Moreover, Justice O'Connor's concurrence in *Hodgson* likewise applies the "rational relationship" test by agreeing with Justice Stevens that the statute at issue could not be " 'sustained if the obstacles it imposes are

not reasonably related to legitimate state interests.' " *Hodgson*, 497 U.S. at 459.[2]

The decision below, however, demonstrates that it is important for this Court to authoritatively determine whether the "rational relationship" or "undue burden" test should be employed in analyzing parental notice statutes.

IV

ALTERNATIVELY, EVEN IF THE UNDUE BURDEN TEST IS APPLICABLE, THE DECISION OF THE COURT OF APPEALS CONFLICTS, IN PRINCIPLE, WITH PRIOR DECISIONS OF THIS COURT.

Even if the "undue burden test" applies to parental notice statutes, the Respondents' case fails because it has failed to show existence of such a burden.

A. The South Dakota statute does not give a veto over an abortion with regard to any minor.

This Court has consistently indicated that a need for judicial bypass arises when a statute purports to give a *veto* power over an abortion to a minor. The South Dakota statute does not so operate in that it requires only a *notice* and only to *one* parent. In *Akron II*, 497 U.S. at 510, the

---

[2] *Planned Parenthood v. Casey* did not establish that the "undue burden test" must be used in both parental notice and parental consent cases as argued below. *Casey* is a *consent* case, *see Casey*, 112 S.Ct. at 2832, and there is no reason to read it to overrule *Hodgson*, which it cites twice in the brief decision of the parental consent statute there at issue. *Casey*, 112 S.Ct. at 2832.

Court stressed that the reason that a bypass procedure had been required in earlier cases was

> in order to prevent another person from having an *absolute veto power* over a minor's decision to have an abortion. . . . (Emphasis added).

The Court in that same decision indicated agreement with the decision in *H.L. v. Matheson*, 450 U.S. 398, 411, n.17 (1981), that

> notice statutes are not equivalent to consent statutes because they do not give anyone a veto power of (sic) over a minor's abortion decision.

Akron II, 497 U.S. at 511. Because South Dakota's statute is a notice, not a consent statute, it does not allow a veto and it does not, in that respect, impose an "undue burden." Moreover, the decision of the court of appeals, which was based on the thesis that South Dakota's notice statute was the rough equivalent of a consent statute, see, App. 16; *id.* at 17, citing *Bellotti*, 443 U.S. at 643-644, was accordingly incorrect.

B. The court of appeals erred in treating South Dakota's one-parent notice statute as equivalent to a two-parent statute.

Hodgson makes it abundantly clear that a one-parent notice statute may not be analyzed the same as a two-parent statute. *Hodgson*, 497 U.S. at 450 found that the

> requirement that *both* parents be notified . . . does not reasonably further any legitimate state interest. (Emphasis in original).

Furthermore, the Court found that while the second parent might have an "interest in the minor's abortion decision," the communication involved in such a decision-making process

> may not be decreed by the State. The State has no more interest in requiring all families to talk with one another than it has in requiring certain of them to live together.

Hodgson, 497 U.S. at 452. Justice O'Connor, in addition, specifically agreed with Justice Stevens that the State had "offered no sufficient justification for its interference with the family's decisionmaking process created by subdivision 2 [of the Minnesota statute] – two-parent notification." *Hodgson*, 497 U.S. at 459 (O'Connor, J. concurring). The court of appeals recognized the nature of the dispute. *See*, App. at 15-16 and n.8.

Nonetheless, the court of appeals, in effect, equated one-parent and two-parent notice provisions and essentially ignored the argument of the State that the distinction was a critical one. The court did comment in a footnote that it was "no answer to say that the minor could simply notify her other parent" and that "[r]oughly eighteen per cent. of South Dakota's minors live in single-parent homes. . . . " App. at 24, n.10. But *Hodgson* distinguished between one and two parent notice statutes, even in light of the finding of the district court in *Hodgson* that "9% of the minors in Minnesota live with *neither* parent and 33% live with *only one parent*." *Hodgson*, 497 U.S. at 437 (emphasis added).

The court of appeals' treatment of a one-parent notice statute as equivalent to a two-parent statute is inconsistent with *Hodgson* and is not based on a firm evidentiary foundation.

C. The court of appeals incorrectly extended the rationale of *Casey* for striking down spousal notice to the issue of one-parent notice with regard to "mature minors".

The essence of the decision of the court of appeals with regard to so-called "mature minors" is that, if a minor is mature enough to make her own decisions, the State cannot give one of the parents "a chance – or even a tool" to obstruct a decision to have an abortion, just as the State cannot give this tool to a woman's husband. App. at 17; *see id.* at 23.

The court of appeals thus essentially applied the rationale of *Casey*, 112 S.Ct. at 2829-30, with regard to the *spousal* notice, to the situation in which *one parent* would be notified. The application is erroneous as a matter of law.

First, the attempt to characterize the spousal relationship the same as the parent-child relationship is contrary to *Casey* itself. The Joint Opinion in *Casey* at 112 S.Ct. at 2831, flatly stated:

> A State may not give to a man the kind of dominion over his wife that parents exercise over their children.

Furthermore, the Joint Opinion analysis stated that although the spousal notice provision was unconstitutional, this "conclusion is in no way inconsistent with our decisions upholding parental notification or consent requirements." *Casey*, 112 S.Ct. at 2830.

The Joint Opinion continued at *id.*:

> Those enactments, and our judgment that they are constitutional, are based on the quite reasonable assumption that minors will benefit from consultation with their parents and that children will often not realize that their parents have their best interest at heart. We cannot adopt a parallel assumption about adult women.

Despite the message of *Casey*, the court of appeals found that if a minor "can demonstrate that she is mature, the State has no legitimate reason for imposing liberty restrictions upon her that it may not impose on an adult." App. at 23. The court thus validated an abortion for these minors for "good reasons," *id.*, or, presumably, for no reason at all. *Id.* The quintessence of the Court's ruling is thus that once the minor is adjudged "mature" (in a secret proceeding with no parental input), the parental role is eviscerated with regard to the abortion decision.

The decision of the court of appeals thus fails to protect the rights of parents which this Court has acknowledged in similar contexts, *see, e.g., Lassiter*, 452 U.S. at 27; *Prince v. Commonwealth of Massachusetts*, 321 U.S. at 166, and fails to recognize that parents are entitled to give assistance to their minor children facing difficult decisions. *See generally, Casey*, 112 S.Ct. at 2830-2832; *Hodgson*, 497 U.S. at 450. Furthermore, the decision fails

to recognize that any female, including, of course, a "mature" minor, may well have medical or psychological complications from her abortion, *see* Affidavit of Dr. Lyons at ¶¶ 8-9. *See also*, Affidavit of Dr. Elkind at ¶ 12. This puts the parents, (who remain, paradoxically, legally responsible for the minor), in the position of being unable to assist their "mature" minor because of their lack of knowledge of the situation. The decision of the court of appeals thus is inconsistent with other decisions of this Court recognizing the parents as the primary caretakers of their minor children.[3]

D. The South Dakota statute provides better protections for abuse victims than are available in judicial bypass states.

The court of appeals found that South Dakota's exception for abused and neglected children was deficient in that it did not adequately provide for the victims of sexual abuse. App. at 24-25. South Dakota's "abuse and neglect" exception specifically includes such victims. *See* SDCL 26-8A-2(8). App. at 85. The court of appeals found, however, that "many minors who are abused will not be able to use the abuse exception" because of the reluctance of abuse victims to admit the abuse, App. at 24-25, and that "[e]ven if South Dakota's exception were

---

[3] Furthermore, it should be noted that the California spousal notice statute at issue in *Casey* is not comparable to the South Dakota parental notice statute because the exceptions in Pennsylvania are quite narrow, *see Casey*, 112 S.Ct. at 2837 (Appendix) as compared to the broad exceptions from parental notice found in the South Dakota statute. *See* SDCL 26-8A-2, App. at 84.

otherwise acceptable, its failure to provide an alternative procedure for these minors would doom it." App. at 25.

The flaw in the analysis of the court of appeals is that this Court has specifically approved of a judicial bypass for best interest minors in the context of a *consent* statute. *Casey*, 112 S.Ct. at 2832. Obtaining an abortion by judicial order by reason of the abuse is dependent on *telling the judge of the abuse*. In South Dakota, the abuse victim is allowed to impart the abuse information in confidence. SDCL 34-23A-7(3). App. at 84. As South Dakota's affidavits indicate, it is certainly less of a burden on either an immature or mature minor to report abuse to a doctor than to a judge in a judicial bypass proceeding. *See* Affidavit of Dr. Elkind at ¶ 5; *see also*, Affidavit of Dr. Lyons, ¶¶ 27-29.

Furthermore, South Dakota's experts submitted affidavits which demonstrated that South Dakota's abuse reporting requirement will likely result in an *increased* number of adolescents reporting abuse. Affidavit of Asst. Attorney General Ronald Campbell at ¶ VIII; Affidavit of Judy Hines at ¶¶ XV-XVI; Affidavit of Dr. Lyons at ¶ 12. In other words, by sustaining the constitutionality of South Dakota's act, an additional number of young women will be able to get the assistance they critically and tragically need. Respondents' attack on the constitutionality of the statute stands in the way of the State achieving this important objective.[4]

---

[4] In any event, it should be noted that Respondent Dr. Williams reported 963 abortions on minors 17 years and younger between 1986 and 1993; he reported that only *one* of those pregnancies was aborted as a result of rape or incest. Affidavit of Doris J. Donner, Exhibit 3. *See also* Affidavit of Judy Hines, at ¶ XVII (Program administrator is unaware of any cases of abuse and neglect reported by Respondent Williams pursuant to SDCL 26-8A-3 within the last six years).

E. The South Dakota statutory arrangement will maintain the confidentiality of the abortion requested.

The court of appeals struck the South Dakota statute in part because it found that the "by-pass" for abused and neglected minors did not adequately protect the minor's confidentiality. App. at 20-21. No findings had been made by the district court on this issue.

The court of appeals decision conflicts with the strong language of SDCL 34-23A-7(3), (App. at 84), that

> the department of social services, the state's attorney and law enforcement officers . . . shall maintain the confidentiality of the fact that she has sought or obtained an abortion and shall take all necessary steps to ensure that this information is not revealed to her parents.

The court of appeals relied upon statutes regulating juvenile discovery proceedings, but that reliance was inappropriate; the provisions of the abortion law predominate over the discovery statutes relied on as a matter of South Dakota law because they are the later enacted statutes, *see In re Estate of Smith*, 401 N.W.2d 736, 740 (S.D. 1987), and because they pertain specifically to confidentiality requirements regarding abortions on minors. *See Bienert v. Yankton School District No. 63-3*, 507 N.W.2d 88, 91 (S.D. 1993). *See also Harding County v. South Dakota Land Users Association*, 486 N.W.2d 263, 265 (S.D. 1992)

(South Dakota courts will, when a reasonable construction is available, read statutes so as to uphold their constitutionality). The court likewise ignored the extensive procedures set out by the Department of Social Services to further guarantee the confidentiality of the information, *see* Affidavit of Judy Hines at ¶¶ X-XIV, and likewise ignored the Affidavit of Attorney General Barnett with regard to this matter. Affidavit of Mark Barnett at ¶ 8.[5]

Finally, it might be noted that the incidence of pregnancy occurring as a result of sexual abuse appears to be very infrequent. Ron Campbell, who reviews every sexual abuse case reported to the Department of Social Services on the Intake Worksheet, Affidavit of Asst. Attorney General Ronald Campbell at ¶ III, was aware of only "three pregnancies occurring as a result of incest" in his eleven year tenure. *Id.* at ¶ IV. Only one of those was terminated by abortion. *Id.* In that case, the child involved "voluntarily testified to this fact in a criminal trial to the court." *Id.* Thus, there was no record on which the court of appeals could determine that there is a significant chance that an abortion will be revealed in an abuse proceeding. *See also*, n.4, *supra*.

---

[5] The Court of Appeals likewise ignored the fact that while over 10,000 abuse and neglect reports were investigated in one year's time by DSS, no legal actions have ever been brought against it or its employees for breach of confidentiality. *See* Affidavit of Judy Hines at ¶ VIII.

F. The affidavits cited by the court of appeals failed to show the existence of a large fraction of minors who would be unduly burdened by South Dakota parental notice statute.

Neither the district court nor the court of appeals cited any statistics to demonstrate that a "large fraction" of affected minors would be "unduly burdened" by South Dakota's parental notice statute. *Casey*, 112 S.Ct. at 2830. Further, the district court did not cite or analyze affidavits in its decision as to the issue and made no factual findings thereon. The circuit court did make some examination of the affidavits but failed to give appropriate consideration to the distinctions which are critical in this case, including the distinction between one- and two-parent notice statutes.

As indicated above, the court in a footnote did attempt to justify the treatment of the one-parent statute on the same basis as a two-parent statute by finding that some minors lived with only one parent. App. at 24, n.10. Such statistics were offered in *Hodgson*, 497 U.S. at 437, but did not suffice to support identical treatment of one- and two-parent statutes in that case. *Hodgson*, 497 U.S. at 450; *see also*, *Hodgson*, 497 U.S. at 459-460 (O'Connor, J.). Nor do such statistics allow identical treatment of one- and two-parent statutes here.

Moreover, South Dakota established that the notice statute not only did not "unduly burden" minors, but the operation of that statute was to the minors' benefit. South Dakota demonstrated, for example, that when a parent was notified that a minor is considering an abortion, the parent can help the minor consider multiple perspectives

involved in the decision, and the parental notification requirement "will likely facilitate a better decision making process in the majority of cases." Affidavit of Dr. Lyons, ¶ 17. More critically, when a parent is notified of the abortion decision, he or she is available to help the minor deal with "more serious" medical complications which can take place in about five percent of the cases and with psychological complications, including depression and guilt, which "can occur in as many as one-quarter to one-third of cases." *Id.* at ¶ 8.

In short, the record does not allow the conclusion that an "undue burden" is created by South Dakota's one-parent notice requirement with regard to a "large fraction" of affected minors.

CONCLUSION

Wherefore, the Petitioners respectfully request that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

MARK W. BARNETT
Attorney General
Counsel of Record

JOHN P. GUHIN
JANINE KERN
Deputy Attorneys General
500 E. Capitol
Pierre, SD 57501-5090
Telephone: (605) 773-3215

November, 1995

APPENDIX

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Nos. 94-3326SD, 94-3398SD

Planned Parenthood, Sioux Falls Clinic; Buck J. Williams, M.D.; And Women's Medical Services, P.C., Appellees/ Cross-Appellants, v. Walter D. Miller, Governor, In His Official Capacity, And Mark W. Barnett, Attorney General, In His Official Capacity, Appellants/ Cross-Appellees.	On Appeal From the United States District Court for the Distict of South Dakota

Submitted: May 15, 1995

Filed: August 31, 1995

Before RICHARD S. ARNOLD, Chief Judge, JOHN R. GIBSON, Senior Circuit Judge, and FAGG, Circuit Judge.

RICHARD S. ARNOLD, Chief Judge.

The Governor and Attorney General of South Dakota ("the State") appeal from a District Court[1] ruling that the parental-notice provision of its abortion law is unconstitutional on its face because it fails to provide a bypass mechanism to allow mature and "best interest" minors to proceed with an abortion without notifying a parent. The State also appeals the District Court's holding that its provisions for civil and criminal penalties for performing illegal abortions are unconstitutional because they lack a scienter requirement. In the alternative, the State asks us to certify to the South Dakota Supreme Court the issue of whether that court would interpret the civil-and-criminal penalty provisions to include scienter requirements.

Planned Parenthood, Sioux Falls Clinic, Dr. Buck Williams, and Women's Medical Services (collectively, "Planned Parenthood") cross-appeal the District Court's ruling that South Dakota may constitutionally require physicians to provide certain information to all abortion patients 24 hours before the abortion is performed. They also argue that the constitutional provisions of the South Dakota law are not severable from the unconstitutional criminal- and civil-penalties provisions, and that the District Court erred in not striking the challenged Act in its entirety.

We affirm in all respects.

---

[1] The Hon. Richard H. Battey, Chief Judge, United States District Court for the District of South Dakota.

I.

After South Dakota amended its abortion law in 1993, Planned Parenthood challenged the amended Act as facially unconstitutional. South Dakota's Act to Regulate the Performance of Abortion, S.D. Codified Laws Ann. § 34-23A-1 *et seq.*, amended by 1993 S.D. Laws ch. 249, restricts a woman's choice to have an abortion in several ways. Section 34-23A-7, the parental-notice provision, requires a physician or his agent to notify a pregnant minor's parent of the impending abortion 48 hours before the abortion is to be performed.[2] Section 34-23A-10.1, the

---

[2] Section 34-23A-7 provides:

No abortion may be performed upon an unemancipated minor or upon a female for whom a guardian has been appointed because of a finding of incompetency, until at least forty-eight hours after written notice of the pending operation has been delivered in the manner specified in this section. The notice shall be addressed to the parent at the usual place of abode of the parent and delivered personally to the parent by the physician or an agent. In lieu of such delivery, notice may be made by certified mail addressed to the parent at the usual place of abode of the parent with return receipt requested and restricted delivery to the addressee, which means a postal employee can only deliver the mail to the authorized addressee. If notice is made by certified mail, the time of delivery shall be deemed to occur at twelve o'clock noon on the next day on which regular mail delivery takes place, subsequent to mailing.

No notice is required under this section if:

(1) The attending physician certifies in the pregnant minor's medical record that, on the basis of the physician's good faith clinical judgment, a medical emergency exists that so complicates the

mandatory-information provision, provides that no abortion may be performed unless certain information is provided to the patient at least 24 hours beforehand.[3] Section

---

medical condition of a pregnant female as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create a [sic] serious risk of substantial and irreversible impairment of a major bodily function and there is insufficient time to provide the required notice; or

(2) The person who is entitled to notice certifies in writing that he has been notified; or

(3) The pregnant minor declares, or provides information that indicates, that she is an abused or neglected child as defined in § 26-8A-2 and the attending physician has reported the alleged or suspected abuse or neglect as required in accordance with §§ 26-8A-3, 26-8A-6 and 28-6A-8 [sic] 26-8A-8. In such circumstances, the department of social services, the state's attorney and law enforcement officers to whom the report is made or referred for investigation or litigation shall maintain the confidentiality of the fact that she has sought or obtained an abortion and shall take all necessary steps to ensure that this information is not revealed to her parents.

[3] Section 34-23A-10.1 provides:

No abortion may be performed except with the voluntary and informed consent of the female upon whom the abortion is to be performed. Except in the case of a medical emergency, consent to an abortion is voluntary and informed only if:

(1) The female is told the following by the physician who is to perform the abortion or by the referring physician, at least twenty-four hours before the abortion:

34-23A-22 provides for civil damages when an abortion is performed in violation of the medical-emergency

---

(a) The name of the physician who will perform the abortion;

(b) The particular medical risks associated with the particular abortion procedure to be employed including, when medically accurate, the risks of infection, hemorrhage, danger to subsequent pregnancies and infertility;

(c) The probable gestational age of the unborn child at the time the abortion is to be performed; and

(d) The medical risks associated with carrying her child to term;

(2) The female is informed, by telephone or in person, by the physician who is to perform the abortion, by the referring physician, or by an agent of either, at least twenty-four hours before the abortion:

(a) That medical assistance benefits may be available for prenatal care, childbirth and neonatal care;

(b) That the father is liable to assist in the support of her child, even in instances in which the father has offered to pay for the abortion; and

(c) That she has the right to review the printed materials described in § 34-23A-10.3. The physician or his agent shall orally inform the female that the materials have been provided by the State of South Dakota. If the female chooses to view the materials, they shall either be given to her at least twenty-four hours before the abortion or mailed to her at least seventy-two hours before the abortion by certified mail, restricted delivery to addressee, which means the postal employee can only deliver the mail to the addressee;

(3) The female certifies in writing, prior to the abortion, that the information described in subdivisions (1) and (2) of this section has been furnished her, and that she has been informed of her opportunity to review the information described in § 34-23A-10.3; and

provision,[4] the parental-notification provision, or the mandatory-information provision.[5] And Section

---

(4) Prior to the performance of the abortion, the physician who is to perform the abortion or his agent receives a copy of the written certification prescribed by subdivision (3).
The physician may provide the information prescribed in subdivision (1) by telephone without conducting a physical examination or tests of the patient, in which case the information required to be supplied may be based on facts supplied the physician by the female and whatever other relevant information is reasonably available to the physician.

[4] The medical-emergency provision, Section 34-23A-2.1, provides:

> If a medical emergency compels the performance of an abortion, the physician shall inform the female, prior to the abortion if possible, of the medical indications supporting his judgment that an abortion is necessary to avert her death or that [sic, a] delay will create serious risk of substantial and irreversible impairment of a major bodily function.

[5] Section 34-23A-22 provides:
If any abortion occurs which is not in compliance with § 34-23A-2.1, 34-23A-7, [sic, or] 34-23A-10.1, the person upon whom such an abortion has been performed, and the parent of a minor child upon whom such an abortion was performed, or any of them, may maintain an action against the person who performed the abortion for ten thousand dollars in punitive damages and treble whatever actual damages the plaintiff may have sustained. Any person upon whom such an abortion has been attempted may maintain an action against the person who attempted to perform the abortion for five thousand dollars in punitive damages and treble whatever actual damages the plaintiff may have sustained.
If judgment is rendered in favor of the plaintiff in any such action, the court shall also render judgment for a reasonable attorney's fee in favor of the plaintiff against

34-23A-10.2 makes it a misdemeanor for a physician to violate the same provisions of the Act.[6]

Since 1973, the Supreme Court has recognized that women have a fundamental constitutional right to choose whether to terminate or continue their pregnancies. *Roe v. Wade*, 410 U.S. 113 (1973). This right is not absolute or unqualified; instead, the woman's right to decide whether or not to carry her pregnancy to term is balanced by the State's interest in protecting both her health and the potential life of the fetus. *Id.* at 162. After the fetus

---

> the defendant. If judgment is rendered in favor of the defendant and the court finds that the plaintiff's suit was frivolous and brought in bad faith, the court shall also render judgment for a reasonable attorney's fee in favor of the defendant against the plaintiff.

[6] Section 34-23A-10.2 provides:
A physician who violates § 34-23A-2.1, 34-23A-7 [sic, or] 34-23A-10.1 is guilty of a Class 2 misdemeanor. The court in which a conviction of a violation of § 34-23A-2.1, 34-23A-7 or 34-23A-10.1 . . . shall report such conviction to the board of medical and osteopathic examiners.
No penalty may be assessed against the female upon whom the abortion is performed or attempted to be performed. No criminal penalty or civil liability for failure to comply with subsection 34-23A-10.1 (2) (c) or that portion of subsection 34-23A-10.1 (3) requiring a written certification that the woman has been informed of her opportunity to review the information referred to in subsection 34-23A-10.1 (2) (c) may be assessed unless the department of health has made the printed materials available at the time the physician or his agent is required to inform the female of her right to review them.

becomes viable – able to survive outside the womb – the State's interest in protecting its potential life becomes compelling enough in some circumstances to outweigh the woman's right to seek an abortion. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S.Ct. 2791, 2804 (1992).[7] Before viability, however, "the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure." *Ibid.* The State can impose regulations designed to ensure that the woman makes a thoughtful and informed choice, but only if such regulations do not unduly burden her right to choose whether to abort. *Id.* at 2818.

Planned Parenthood claims that South Dakota regulations unduly burden a woman's right to choose. The State of South Dakota counters that its regulations merely ensure that the woman's choice is informed and thoughtful. On cross-motion for summary judgment, the District Court held that the parental-notice, civil-damages, and criminal-penalty provisions of South Dakota's abortion law place an undue – and thus unconstitutional – burden

---

[7] Our citations to *Casey*, unless otherwised [sic] noted, will be to the joint opinion of Justices O'Connor, Kennedy, and Souter. Although Justice Stevens and Justice Blackmun did not join the authors of the joint opinion in announcing the undue-burden test, they advocated an even stricter standard of review. *Casey*, 112 S.Ct. at 2838 (Stevens, J., concurring in part and dissenting in part (; *id.* at 2847) Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part). The undue- burden test is thus the lowest common denominator. We view the joint opinion as the Supreme Court's definitive statement of the constitutional law on abortion.

on a woman's right to privacy, but that the mandatory-information provision does not. Both parties appeal.

II.

The critical issue in this case is a threshold one: what is the standard for a challenge to the facial constitutionality of an abortion law? The State would have us apply the test set out in *United States v. Salerno*, 481 U.S. 739 (1987), under which "the challenger must establish that no set of circumstances exists under which the Act would be valid." *Salerno*, 481 U.S. at 745. Planned Parenthood, on the other hand, contends that the Supreme Court replaced the *Salerno* test in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S.Ct. 2791 (1992). Under *Casey*, it claims, an abortion law is unconstitutional on its face if, "in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." *Id.* at 2830.

The Supreme Court had previously applied *Salerno* in striking down facial challenges to abortion laws. See *Rust v. Sullivan*, 500 U.S. 173, 182-84 (1991); *Webster v. Reproductive Health Services*, 492 U.S. 490, 524 (1989). But a majority of the Court in *Casey* applied a different test – the one Planned Parenthood advocates here – in determining that Pennsylvania's spousal-notification law was facially invalid. Chief Justice Rehnquist highlighted this departure in his dissent in *Casey*, arguing that "it is insufficient for petitioners to show that the [spousal] notification provision 'might operate unconstitutionally under some conceivable set of circumstances.' " *Casey*,

112 S.Ct. at 2870 (quoting *Salerno*, 481 U.S. at 745). The majority made no response to this contention. Indeed, even though the joint opinion's authors "carefully reviewed and selectively departed from other earlier precedent," *Fargo Women's Health Org. v. Schafer*, 18 F.3d 526, 529 (8th Cir. 1994), they did not expressly reject *Salerno*, even though applying a test incompatible with it.

Other circuits have split on the question whether *Casey* effectively overruled *Salerno* for abortion cases. The Third Circuit believes that the Supreme Court "set a new standard for facial challenges to pre-viability abortion laws." *Casey v. Planned Parenthood*, 14 F.3d 848, 863 n.21 (3d Cir. 1994) (on remand) (dicta). The Fifth Circuit, however, refused to "interpret *Casey* as having overruled, *sub silentio*, longstanding Supreme Court precedent governing challenges to the facial constitutionality of statutes," and it continues to apply the *Salerno* standard. *Barnes v. Moore*, 970 F.2d 12, 14 & n.2 (5th Cir.), *cert. denied*, 113 S.Ct. 656 (1992).

Indeed, even the Justices of the Supreme Court dispute *Casey's* effect. Justice Scalia, joined by Chief Justice Rehnquist and Justice White, has stated that the only exception to the *Salerno* standard is for First Amendment cases, and "[t]he Court did not purport to change this well-established rule [in *Casey*]." *Ada v. Guam Soc'y of Obstetricians & Gynecologists*, 113 S.Ct. 633, 634 (1992) (Scalia, J., dissenting from the denial of certiorari). But Justice O'Connor, joined by Justice Souter, has emphasized that the Supreme Court in *Casey* "did not require petitioners to show that the provision would be invalid in all circumstances. Rather, we made clear that a law restricting abortions constitutes an undue burden, and

hence is invalid, if, 'in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion.' " *Fargo Women's Health Org. v. Schafer*, 113 S.Ct. 1668, 1669 (1993) (O'Connor, J., concurring in the denial of a stay pending appeal).

We cannot know how the Supreme Court will ultimately resolve this issue, but we must now decide it for ourselves. We were able to avoid the issue of which standard to follow in *Fargo Women's Health Organization v. Schafer*, *supra*, 18 F.3d 526. The result in that case would have been the same no matter which test was applied. *Id.* at 529-30, 532-33. Here, though, Planned Parenthood cannot meet the *Salerno* test, for circumstances exist under which the South Dakota law would be constitutional – its restrictions, for example, would be quite valid after a pregnancy had progressed past the point of viability. But Planned Parenthood could meet *Casey's* undue-burden test if, for example, the parental-notice law would be a substantial obstacle to a "large fraction" of minor women seeking pre-viability abortions. Thus, the standard we choose to follow today may well determine the outcome of this case.

We choose to follow what the Supreme Court actually did – rather than what it failed to say – and apply the undue-burden test. It is true that the Court did not expressly reject *Salerno's* application in abortion cases, but it is equally true that the Court did not apply *Salerno* in *Casey*. If it had, it would have had to uphold Pennsylvania's spousal-notification law, because that law imposed "almost no burden at all for the vast majority of women seeking abortions." *Casey*, 112 S.Ct. at 2829. Instead, the

Court held that "[t]he proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." *Id.* at 2829. If the law will operate as a substantial obstacle to a woman's choice to undergo an abortion "in a large fraction of the cases in which [it] is relevant, . . . [i]t is an undue burden, and therefore invalid." *Id.* at 2830.

We believe the Court effectively overruled *Salerno* for facial challenges to abortion statutes. We will therefore apply the *Casey* standard to determine if South Dakota's Act to Regulate the Performance of Abortion is constitutional on its face.

III.

We turn first to the Act's parental-notice provision, S.D.C.L. § 34-23A-7. Under that provision, physicians must notify one of a pregnant minor's parents of the intended abortion at least 48 hours before performing the abortion unless: (1) the physician has certified that a medical emergency exists; (2) the parent has certified that he or she has been notified; or (3) the physician has reported to the appropriate authorities that the minor has declared or indicated that she is an abused or neglected child. A physician who performs an abortion on a minor without notifying her parent or meeting one of these exceptions is subject to both criminal and civil penalties.

The District Court began its analysis of the constitutionality of this provision by looking to prior Supreme

Court cases involving parental-notice and parental-consent laws. It found no case on point, but it concluded that "[s]tate and parental interests must yield to the constitutional right of a mature minor, or of an immature minor whose best interests are contrary to parental involvement, to obtain an abortion without consulting or notifying the parent or parents." *Planned Parenthood v. Miller*, 860 F.Supp. 1409, 1415 (D.S.D. 1994). The District Court determined that a minor is entitled to a procedure designed to bypass the parental-notice requirement by allowing the minor to proceed with the abortion if she can show that she has the maturity to make her decision independently of her parent's advice or, even if she lacks such maturity, that having an abortion without notifying her parents would be in her best interests. *Ibid.* Since the South Dakota law lacks such a bypass procedure, the District Court held that it was unconstitutional. *Id.* at 1416.

The State argues that parental-notice laws do not need a bypass procedure to be constitutional. It argues that the Supreme Court has required bypass procedures only for consent statutes and that five Justices have agreed that "notice statutes are not equivalent to consent statutes." *Ohio v. Akron Center for Reproductive Health (Akron II)*, 497 U.S. 502, 511 (1990). Planned Parenthood counters that even though notice and consent statutes are not equivalent, they may, as a practical matter, impose the same burden. If that burden is undue under consent statutes without a bypass, then it should be undue under notice statutes without a bypass.

The State responds that even if a parental-notice provision needs a bypass to be constitutional, its "doctor

bypass" for abused and neglected minors should suffice. Indeed, the State claims that its bypass is less of a burden than the judicial bypass required for consent statutes. Planned Parenthood disputes that claim and points out that South Dakota's bypass for abused and neglected minors does not provide an alternative to parental notice for mature or "best interest" minors who have not been mistreated. We agree with Planned Parenthood on this point.

A.

We begin, as the District Court did, with a review of Supreme Court precedent. "An undue burden exists, and therefore a provision of law is invalid, if this purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Casey*, 112 S.Ct. at 2821. The Court has established that a parental-*consent* requirement is not an undue burden for minors seeking abortions so long as the minor has the opportunity to avoid the requirement by demonstrating that she is mature or that an abortion is in her best interests. *Bellotti v. Baird*, 443 U.S. 622, 651 (1979) (plurality). See also *City of Akron v. Akron Center for Reproductive Health*, (*Akron I*), 462 U.S. 416, 440 (1983) (following *Bellotti* by invalidating a consent statute that made "a blanket determination that all minors under the age of 15 are too immature to make [an abortion] decision or that an abortion never may be in the minor's best interests without parental approval"). Under *Bellotti*, consent statutes must have an expeditious, anonymous bypass procedure that allows a minor to show either that she has the maturity to make her own abortion decision or, even if

she is immature, that the desired abortion would be in her best interests. *Bellotti*, 443 U.S. at 643-44; *Akron II*, 497 U.S. at 511-13 (reviewing criteria for bypass). Without that opportunity, the consent requirement unduly burdens the minor's right to choose.

As for notice requirements, the Supreme Court has established that the State may require parental notice for immature minors who cannot show that an abortion would be in their best interests. *H.L. v. Matheson*, 450 U.S. 398, 409 (1981); *id.* at 414 (Powell, J., concurring). On the other hand, the Court has held that statute requiring notice to *both* parents is unconstitutional without a bypass procedure, but constitutional with one.[8] *Hodgson v. Minnesota*, 497 U.S. 417, 461 (1990) (O'Connor, J., concurring in part and concurring in the judgment in part); *id.* at 481 (Kennedy, J., concurring in the judgment in part and dissenting in part). As *Hodgson* made clear, some of the Justices would hold that requiring one-parent notice

---

[8] The Court was sharply divided in *Hodgson*, with four Justices holding that a two-parent notice requirement is constitutional with or without bypass, four Justices holding that it is unconstitutional with or without bypass, and one Justice – Justice O'Connor – holding that it is unconstitutional without a bypass, but constitutional with one. *Id.* at 479 (Scalia, J., concurring in the judgment in part and dissenting in part) (summarizing the holdings). Justice O'Connor held that the two-parent notice requirement, which required the minor to notify both parents even when one parent agreed that the other should not be notified, unduly interfered in internal family operations, but she found that this problem "simply does not exist where the minor can avoid notifying one or both parents by use of the bypass procedure." *Id.* at 461 (O'Connor, J., concurring in part and concurring in the judgment in part).

is unconstitutional even with a bypass procedure, while others would hold that a more restrictive two-parent notice requirement is constitutional even without a bypass. *Id.* at 462 (Marshall, J., concurring in part, concurring in the judgment in part, and dissenting in part); *id.* at 489 (Kennedy, J., concurring in the judgment in part and dissenting in part). In short, the Supreme Court has yet to decide whether a mature or "best interest" minor is unduly burdened when a State requires her physician to notify one of her parents before performing the abortion.

To resolve that issue, we first consider why requiring parental notice – or, for that matter, parental consent – is *not* an undue burden on immature minors who cannot show that an abortion would be in their best interests. After all, "many parents hold strong views on the subject of abortion, and your pregnant minors, especially those living at home, are particularly vulnerable to their parents' efforts to obstruct . . . an abortion. . . ." *Bellotti*, 443 U.S. at 647. Notifying the parent of the daughter's intentions 48 hours before the abortion can be performed gives the parent the opportunity to obstruct the daughter's choice, just as requiring consent gives parents the tool with which to do so. The possibility of such obstruction – or even attempted obstruction – might be considered a substantial obstacle for a large fraction of minors seeking pre-viability abortions. *Cf. Casey*, 112 S.Ct. at 2829-30 (holding that spousal-notice requirement imposed substantial obstacle for a large fraction of married women seeking abortions who did not wish to notify their husbands of their intentions because of the very real possibility that their husbands would try to obstruct the

abortion). Why, then, has the Court found that immature minors are not unduly burdened by this obstacle?

The answer, of course, is that they are minors, and States may impose requirements on immature minors that it may not impose on adults. *Akron I*, 462 U.S. at 427 n.10. Immature minors are simply not capable of making the informed, independent decisions that adults can. See *id.*; *Bellotti*, 443 U.S. at 635-36; *Hodgson*, 497 U.S. at 458-59 (O'Connor, J., concurring in part and concurring in the judgment in part). "As immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences, a State reasonably may determine that parental consultation often is desirable and in the best interest of the minor." *Bellotti*, 443 U.S. at 640 (quoted by Justice O'Connor in *Hodgson*, 497 U.S. at 458).

The State can thus give parents a chance – or even a tool – to obstruct their immature, non-best-interests daughter's decision to have an abortion without violating the Constitution. The State runs afoul of the Constitution, however, when it attempts to give that same power to parents of mature daughters capable of making their own informed choices. *Bellotti*, 443 U.S. at 643-44 & n.23. Because maturity does not always correspond to the age of majority, minors must have the chance to demonstrate their maturity. *Id.* at 650. See also *id.* at 644 n.23 ("[T]he peculiar nature of the abortion decision requires the opportunity for case-by-case evaluations of the maturity of pregnant minors."). By showing that they are capable of mature, informed consideration, such minors establish that the State has no legitimate reason for imposing a

restriction on their liberty interests that it could not impose on adult women.

As for immature minors whose best interests would be served by having an abortion, "the justification for any rule requiring parental involvement in the abortion decision rests entirely on the best interests of the child." *Hodgson*, 497 U.S. at 454. States may generally require the parent's involvement in an immature minor's abortion decision because it is presumed that a parent will act in the minor's best interest. But if the minor can show that an abortion without notification would be in her best interest, then the State has no further reason for requiring such notice.

For both mature and "best interest" minors, then, the State has no legitimate interest in imposing a parental-notice requirement with the purpose or effect of placing a substantial obstacle in their paths when they seek previability abortions. For this reason, we hold that the State may not impose a parental-notice requirement without also providing a confidential, expeditious mechanism by which mature and "best interest" minors can avoid it. In short, parental-notice provisions, like parental-consent provisions, are unconstitutional without a *Bellotti*-type bypass. We do not think that requiring notice to only one parent avoids this problem. Such a requirement still places a substantial obstacle in the way of a mature or best-interests minor's right to choose.

B.

The State claims that its exception for abused and neglected minors satisfies any need for a bypass procedure. That exception allows an abortion to be performed on a pregnant minor without notice to a parent if her physician has reported to the appropriate authorities that the minor has indicated that she is "abused or neglected" as defined by S.D.C.L. § 26-8A-2.[9] The State

---

[9] Section 26-8A-2 defines an "abused or neglected child" as a child:

(1) Whose parent, guardian, or custodian has abandoned the child or has subjected the child to mistreatment or abuse;
(2) Who lacks proper parental care through [sic,] actions or omissions of the child's parent, guardian or custodian;
(3) Whose environment is injurious to the child's welfare;
(4) Whose parent, guardian or custodian fails or refuses to provide proper or necessary subsistence, supervision, education, medical care or any other care necessary for the child's health, guidance or weil-being;
(5) Who is homeless, without proper care or not domiciled with the child's parent, guardian or custodian through no fault of the child's parent, guardian or custodian;
(6) Who is threatened with substantial harm;
(7) Who has sustained emotional harm or mental injury as indicated by an injury to the child's intellectual or psychological capacity evidenced by an observable and substantial impairment in the child's ability to function within the child's normal range of performance and behavior, with due regard to the child's culture; or

contends that this exception is enough to salvage the constitutionality of its notice provision.

We disagree. South Dakota's exception for abused and neglected minors does not save the notice provision because it does not provide a mechanism by which minors can avoid parental notice by demonstrating to an independent decisionmaker that they are mature or that an abortion would be in their best interests. And while the abuse exception is expeditious – the abortion may be performed 24 hours after the abuse has been reported – it fails to preserve the minor's anonymity or even confidentiality.

1.

South Dakota's "bypass" for abused and neglected minors falls short of protecting the confidentiality of the minor's decision to have an abortion. The statute provides that "the department of social services, the state's attorney and law enforcement officers . . . shall maintain the confidentiality of the fact that she has sought or obtained an abortion." S.D.C.L. § 34-23A-7(3). Nothing, however, prevents a court from ordering production of that information during discovery in a later abuse proceeding. South Dakota law provides numerous opportunities for a parent accused of child abuse to obtain the physician's report of the daughter's abuse. See S.D.C.L.

---

(8) Who is subject to sexual abuse, sexual molestation or sexual exploitation by the child's parent, guardian, custodian or any other person responsible for the child's care.

§ 26-7A-29 (juvenile court may release information on a child to the child's parent); § 26-7A-37 (child's parent authorized to inspect all records of court proceedings, including reports of the Department of Social Services); § 26-7A-58 (respondent parent may inspect or copy any relevant written or recorded statement made by child); § 26-7A-60 (respondent parent may copy any document used in the state's case). In a state where there is only one doctor who performs abortions, the minor's decision to seek an abortion would be revealed merely by the name of the reporting physician. That decision would certainly come to light when the State called the doctor who reported the abuse to testify in the abuse proceeding. In practice, it seems, South Dakota's abuse exception will sometimes result in parental notification, even if after-the-fact. *Cf. Hodgson*, 497 U.S. at 460 (O'Connor, J.) (holding that abuse exception was not a viable alternative because the minor's reluctance to report abuse combined with "the likelihood that invoking the abuse exception . . . will result in notice," made the abuse exception "less than effectual").

2.

South Dakota's abuse exception also fails to provide the minor access to an independent decisionmaker. See *Planned Parenthood Assoc. of Kansas City, Missouri, Inc. v. Ashcroft*, 462 U.S. 476, 493 n.20 (1983) (indicating that a minor should have access to an independent decisionmaker). The State correctly points out that the Supreme Court has not required that bypass procedures be judicial. *Id.* (declining to decide "whether a qualified and

independent nonjudicial decisionmaker would be appropriate"). In establishing the criteria for bypass procedures, the plurality in *Bellotti* noted:

> We do not suggest . . . that a State choosing to require parental consent could not delegate the alternative procedure to a juvenile court or an administrative agency or officer. Indeed, much can be said for employing procedures and a forum less formal than those associated with a court of general jurisdiction.

Bellotti, 443 U.S. at 643 n.22.

Even if bypass procedures can be conducted by nonjudicial decisionmakers, a point we need not decide, such decisionmakers must at least be independent. We agree with the District Court that "[a]n effective, alternative bypass procedure would place the decision in the hands of a neutral and detached agency . . . which would be able to take into consideration the competing interests involved in the abortion decision." *Planned Parenthood*, 860 F. Supp. at 1416. And as the District Court noted, "[t]he physician performing the abortion can hardly be said to be the neutral and detached agency." *Ibid.*

3.

The most fundamental flaw in South Dakota's abuse exception is its failure to allow a neutral decisionmaker to decide, on a case-by-case basis, whether a minor is mature enough to make her own decision or whether an abortion is in her best interests. *Akron II*, 497 U.S. at 522 (Stevens, J.) ("Although it need not take the form of a judicial bypass, the State must provide an adequate

mechanism for cases in which the minor is mature or notice would not be in her best interests."). The whole point of a bypass procedure is to allow the minor to show that the State's justification for requiring parental notice – that minors are immature and in need of guidance for their own best interests – does not apply to her, either because she is mature or because an abortion is actually in her best interest.

South Dakota's "abused or neglected child" exception does not allow minors this opportunity. The State responds that Planned Parenthood has not shown the existence of a "large fraction" of minors in need of this opportunity. It contends that parental notice imposes no burden on mature minors because any truly mature minor would be willing to inform her parent of her intentions. This is a specious argument. Even if a minor is mature and willing to tell her parent, if need be, about her pregnancy and intent to obtain an abortion, she may have good reasons for deciding not to – such as choosing to wait until a more appropriate moment, wishing to avoid causing unnecessary pain, or desiring to reduce potential strife by presenting a fait accompli – just as an adult woman might have good reasons for deciding not to tell her spouse or parent. If a minor can demonstrate that she is mature, the State has no legitimate reason for imposing liberty restrictions upon her that it may not impose on an adult.

The State also argues that Planned Parenthood has failed to prove the existence of minors who could show that an abortion is in their best interests yet who do not fall under South Dakota's abuse exception. On the contrary, Planned Parenthood has submitted affidavits citing

studies that show that a stressful, but non-abusive, parent-child relationship can become abusive or neglectful after the parent learns of the daughter's pregnancy or desire to have an abortion.[10] Declaration of Mary Jones, ¶ 5; Council on Ethical and Judicial Affairs, American Medical Association, *Mandatory Parental Consent to Abortion*, 269 JAMA 82, 83 (1993). An abortion without parental notification might be in this minor's best interest, but she would not qualify for South Dakota's abuse exception. Planned Parenthood also points out that non-abusive parents who differ from their daughters on religious or moral grounds over abortion may be prepared to prevent their daughters from obtaining abortions even when those abortions are in the daughters' best interests. *Bellotti*, 443 U.S. at 647; Declaration of Buck Williams, ¶ 28 (honor-student minor feared parents ideologically opposed to abortion would prevent her from having abortion; when father learned daughter was at clinic, he assaulted staff members and forced daughter to leave); Declaration of Gail Kelly, ¶ 8; Declaration of Carol Knudtson, ¶ 7; Declaration of Joan Williams, ¶ 19. Failing to provide a bypass option for these minors undermines the State's justification for requiring notice in the first place: to ensure that the minors' best interests are served.

Finally, Planned Parenthood has submitted numerous affidavits demonstrating that many minors who are

---

[10] It is no answer to say that the minor could simply notify her other parent. Roughly eighteen per cent. of South Dakota's minors live in single-parent homes; many of them, as a practical matter, have only one parent to notify. Declaration of De Vee Dykstra, Exhibit E (1990 census information). See *Hodgson*, 497 U.S. at 437-38.

abused will not be able to use the abuse exception. The abuser often instills secrecy in the child, to such an extent that victims have trouble talking about the abuse years or even decades later. Knudtson Declaration, ¶ 8; Jones Declaration ¶¶ 3, 4. *Cf. Casey*, 112 S.Ct. at 2827. Many children blame themselves for the abuse and are very protective of the abusive parent. Knudtson Declaration, ¶ 8; Jones Declaration, ¶ 3; Declaration of Penny Virchow, ¶ 9. A minor faced with the untenable choice of turning in her parent or foregoing an abortion will often delay her decision until it is too late; she may even commit suicide rather than choose between two such agonizing choices. Jones Declaration, ¶ 4. Even if South Dakota's exception were otherwise acceptable, its failure to provide an alternative procedure for these minors would doom it.

Planned Parenthood has shown that a large fraction of minors seeking pre-viability abortions would be unduly burdened by South Dakota's parental-notice statute, despite its abuse exception. We affirm the District Court and hold that S.D.C.L. § 34-23A-7 is constitutional on its face.

IV.

The District Court also struck the civil-damages and criminal-penalty provisions of the Act, S.D.C.L. §§ 34-23A-10.2 and 34-23A-22. Section 34-23A-10.2 makes a physician's violation of the parental-notice, mandatory-information, or medical-emergency provisions a Class 2 misdemeanor, punishable by a 30-day imprisonment, a $200 fine, and a report of the conviction to the board of

medical examiners. Section 34-23A-22 allows a cause of action "for ten thousand dollars in punitive damages and treble whatever actual damages the plaintiff may have sustained" against a physician who violates the same provisions.

Neither section contains a scienter requirement on its face. The State, contending that South Dakota courts would nonetheless read a scienter requirement into each section, asked the District Court to certify the issue of the interpretation of the statutes to the South Dakota Supreme Court. The District Court declined to do so, finding that the State's claim of implied scienter "is of little comfort to a physician who wishes to conform his conduct to the law." *Planned Parenthood*, 860 F.Supp. at 1420. The Court held that the criminal provision's lack of mens rea made it unconstitutionally vague, creating a "chilling effect" so that physicians, who cannot guess the standard under which the courts will judge their conduct, would choose not to act at all. *Ibid*. It also held that the strict liability of the civil-damages section unduly burdens a woman's decision to have an abortion by making it unlikely that any physician would be willing to perform it. *Id*. at 1418.

The State appeals these holdings, asking us to certify the interpretation of these provisions to the South Dakota Supreme Court. We find no need to do so. Certification to a state court is appropriate when the state court's construction of an uncertain state law could make resolution of federal constitutional questions unnecessary. See *Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207, 211-12 (1960). Certification is not necessary, though, where the statute is

"neither ambiguous nor obviously susceptible of a limiting construction." *Houston v. Hill*, 482 U.S. 451, 471 (1987). See also *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 237 (1984) (no need to abstain when Act unambiguous and no other provision of state law suggests that Act "does not mean exactly what it says"); *Colorado River Water Const. Dist. v. United States*, 424 U.S. 800, 815 n.21 (1976) ("[T]he opportunity to avoid decision of a constitutional question does not alone justify abstention by a federal court.").

A.

On its face, the criminal-penalty provision is unambiguous: it simply states that performing an abortion in violation of certain provisions of the Act is a crime. There is no need for construction when a statute's language is clear and unambiguous, see *US West v. Public Utilities Comm'n*, 505 N.W.2d 115, 123 (S.D. 1993), but courts must read statutes as constitutional whenever possible. *State v. Stone*, 467 N.W.2d 905, 906 (S.D. 1991). Would the South Dakota Supreme Court construe this unambiguous statute to have a scienter requirement in order to save it?

We think not. The South Dakota Supreme Court has established a test for when it will undertake to read a scienter requirement into a statute that completely lacks one. *State v. Barr*, 237 N.W.2d 888, 891-93 (S.D. 1976); *Stone*, 467 N.W.2d at 906. "Whether criminal intent or guilty knowledge is an essential element of a statutory offense is to be determined by the language of the act in connection with its manifest purpose and design." *State v. Nagel*, 279 N.W.2d 911, 915 (S.D. 1979). If the statute's

language lacks any indication of mens rea, the South Dakota Supreme Court looks at what courts in other jurisdictions have done with similar statutes, particularly when there is a need to maintain uniformity; it then determines whether lesser crimes include a scienter element, making the lack of scienter in the greater crime anomalous; and finally, it looks at whether the State contends that there is a scienter element in the statute. *Barr*, 237 N.W.2d at 891-93; *Stone*, 467 N.W.2d at 906.

Planned Parenthood argues that the South Dakota Supreme Court would undertake this analysis only for statutes modeled on uniform acts. There is some support for this: *Barr* and *Stone* are the only cases in which the South Dakota Supreme Court has read a scienter requirement into a statute completely lacking one, and both involved uniform narcotic laws. We need not decide this issue, however, for the criminal provision here cannot pass the state Supreme Court's test even if that Court were to apply it.

For the first step in the analysis, the South Dakota Supreme Court would look at what other courts have done with similar provisions. In *Barr* and *Stone*, the Supreme Court observed that the courts in other jurisdictions with similar statutes uniformly read a scienter element into the scienter-less statute. *Barr*, 237 N.W.2d at 891; *Stone*, 467 N.W.2d at 906. Here, however, no such body of law exists.

The State points us to *Baird v. Attorney General*, 360 N.E.2d 288 (Mass. 1977), a case in which the Massachusetts Supreme Court held that a physician could claim a good-faith, reasonable mistake as to a minor's age when

prosecuted for performing an abortion on a minor without her parent's consent, even though the abortion statute contained no scienter element. That court, however, found a scienter element in the state's general law on parental consent for medical care, which allowed physicians to assert a good-faith mistake as to the minor's age as a defense. *Id.* at 302. South Dakota has no general law on medical consent for minors.

Our Court also looked to an outside statute to resolve a case involving an abortion statute that had a scienter element for only part of the crime. In *Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft*, 655 F.2d 848 (8th Cir. 1981), *aff'd in part, rev'd in part*, 462 U.S. 476 (1983), we found that a Missouri abortion statute which proscribed "knowingly perform[ing]" an abortion in violation of its provisions did not lack a scienter requirement because Missouri had a statute providing that the culpable mental state – knowingly – extended to each material element of the crime.[11] *Ashcroft*, 655 F.2d at 861-62.

---

[11] Along the same lines, the State refers us to *United States v. X-Citement Video*, 115 S. Ct. 464 (1994), a recent Supreme Court decision holding that the scienter element contained in the first paragraph of a statutory section applied to all of the subparagraphs. *Cf. Colautti v. Franklin*, 439 U.S. 379, 394-95 (1979) (refusing to extend the scienter requirements regarding intention to cause the death of the fetus to the determination of viability); *Schulte v. Douglas*, 567 F.Supp. 522, 527-28 (D.Neb. 1981), *aff'd sub nom. Womens Service, P.C. v. Douglas*, 710 F.2d 465 (8th Cir. 1983) (per curiam) (refusing to extend intent provision for the determination of viability to the subsequent section providing an exception for maternal health). Here the criminal-penalty provision contains no scienter requirement at all. There is thus nothing for us to extend.

The courts in these cases, however, had another statute available to provide scienter. We have not found – and the parties have not cited – any case where a court read a scienter requirement into an abortion statute that, on its face, contained no such element when no secondary statute providing scienter existed. There is thus no body of law to persuade the South Dakota Supreme Court to read beyond the plain language of the statute.

The statute here would also fail the second step of the *Barr* analysis. In *Barr* and *Stone*, the South Dakota Supreme Court looked at similar crimes with lesser penalties that contained a scienter element and found that "it would be anomalous to hold that the legislature intended to require a lesser burden of proof . . . in those offenses carrying the more serious . . . penalty." *Barr*, 237 N.W.2d at 891. On the other hand, the Court also noted that, "[w]ere it not for the apparently uniform holdings of other courts . . . that knowledge is an element" in the statute, the legislature's careful enumeration of scienter elements in related crimes could also lead to the opposite conclusion: that the legislature had deliberately omitted such an element in the statute before it. *Id.* at 892. After all, "[t]he intent of a statute is determined from what the legislature said, rather than what the courts think it should have said, and the court must confine itself to the language used." *US West*, 505 N.W.2d at 123.

Here, of course, there are no "apparently uniform holdings of other courts" that abortion statutes contain implicit scienter elements. There are also no "lesser crimes" involving violation of the abortion Act. The State argues that an anomaly exists here because certain provisions of the Act to Regulate the Performance of Abortion

cannot be violated without a culpable mental state. Thus, it contends, the Act's definition of "medical emergency" as based on the physician's good-faith clinical judgment, S.D.C.L. § 34-23A-7(1), and of "abortion" as the intentional termination of a pregnancy with knowledge that the death of the fetus will result, S.D.C.L. § 34-23A-1(1), is inconsistent with the lack of scienter in the remainder of the Act. We think it likely that the South Dakota Supreme Court would find that these provisions demonstrate the legislature's intent not to require scienter for the Act's other provisions. See *Nagel*, 279 N.W.2d at 916 (fact that another section of the same securities chapter required intent demonstrated that legislature purposefully omitted scienter requirement from securities law at issue).

The third step of the South Dakota Supreme Court's analysis would be easy to meet, since the State admits that the statute has no scienter element. The State maintains instead that state courts would read such an element into the statute, despite its plain language. That seems highly unlikely, given that this third step is the only part of the *Barr* analysis that this statute could pass. The Attorney General's view of the statute is surely not enough in itself to justify reading text into a statute where no such text exists.

We conclude that the South Dakota Supreme Court would not read a scienter element into the plain language of this statute. Since the statute is unambiguous and not easily susceptible to a limiting construction, we find no reason to certify this issue.

We also hold that, without a scienter requirement, this strict criminal-liability statute will have a "profound

chilling effect on the willingness of physicians to perform abortions." *Colautti*, 439 U.S. at 396; *Ashcroft*, 655 F.2d at 861. It thus creates a substantial obstacle to a woman's right to have a pre-viability abortion in the state of South Dakota. We affirm the District Court's decision to strike Section 34-23A-10.2 as unconstitutional.

B.

The civil-damages provision is similarly unambiguous. It simply provides for the trebling of actual damages and a specified amount of punitive damages upon a showing that the defendant violated one of the Act's provisions. This is a strict-liability statute that fixes the amount of damages, and we do not believe that the South Dakota Supreme Court would rule any differently.

The State argues that the statute must be read in conjunction with S.D.C.L. § 21-1-4.1, which requires a court to determine that there is a reasonable basis to believe that the defendant acted with either presumed or actual malice before the issue of punitive damages can be submitted to the trier of fact. *Kjerstad v. Ravellette Publications*, 517 N.W.2d 419, 425 (S.D. 1994); *Dahl v. Sittner*, 474 N.W.2d 897, 900-901 (S.D. 1991). But Section 21-1-4.1 does not add a scienter requirement to Section 34-23A-22. Instead, it creates a procedural threshold that the plaintiff must pass before the court will submit the issue of punitive damages to the jury. *Dahl*, 474 N.W.2d at 902. Once that threshold is passed, the statute "leaves unchanged the substantive nature of the availability of punitive damages." *Ibid.*

Section 21-1-4.1 ensures that there is enough culpability to warrant submitting the issue of punitive damages to the jury, but it does nothing to ensure that the jury itself must find any culpability before awarding punitive damages. *Ibid.* The trier of fact determines the appropriateness of punitive damages under the requirements of the statute that provides for them – in this case, the strict-liability standard of the Act's civil-damages section. *Ibid.* (noting that Section 21-1-4.1 "does not alter the standard of proof required to recover on a punitive damages claim"). Under that standard, it is irrelevant whether the defendant's conduct was actually willful, wanton, or malicious. To award punitive damages under Section 34-23A-22, the jury need find only that the defendant violated the parental-notice, mandatory-information, or medical-emergency provisions of the Act. And once the jury decides to award punitive damages, it has no discretion over the amount of damages to award: the statute fixes it as $10,000.

The State claims that the statute creates a $10,000 cap, rather than a $10,000 award, but that argument is belied by the language of the statute. The civil-damages provision states that the plaintiff "may maintain an action . . . *for* ten thousand dollars in punitive damages." S.D.C.L. § 34-23A-22 (emphasis added). "For" denotes equivalency; one would hardly argue that a "bill for $50" establishes a ceiling rather than the exact amount due. Moreover, a review of other South Dakota statutes reveals that the legislature knows how to set a cap on punitive damages when it wants to. See S.D.C.L. § 23A-28B-35 (allowing punitive damages for a fraudulent claim to the crime victims' compensation board of "not more than double the amount of damages the state has sustained");

§ 30-17-8 (providing for punitive damages "not to exceed the value" of the decedent's estate); § 37-29-3 (providing for punitive damages for willful and malicious trademark appropriation "not exceeding twice" other damages); § 43-32-24 (allowing punitive damages for bad faith retention of rent, "not to exceed $200"). See also § 21-3-11 (providing that damages in medical malpractice action may not exceed $1,000,000).

A punitive damage award based on strict liability and fixed by statute fails to ensure that "[t]he allowance and amount of punitive damages turns on the particular facts of each case." *Wangen v. Knudsen*, 428 N.W.2d 242, 246 (S.D. 1988). A jury usually has the discretion to determine whether the facts of the case warrant an award of punitive damages and, if so, what amount would serve to deter and punish the wrongdoer. Indeed, the South Dakota Supreme Court has established five factors that the trier of fact should consider in determining the amount of punitive damages to award. *Wangen*, 428 N.W.2d at 246. Section 34-23A-22, however, does not allow the trier of fact to determine the amount of punitive damages to impose for a violation of the abortion Act. The five factors would never come into play under this statute, leaving nothing to ensure that the award has "some understandable relationship to compensatory damages" and is "not grossly out of proportion to the severity of the offense." *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991).

Since the civil-damages provision allows punitive damages on a strict-liability basis, it is quite possible that the statutorily fixed $10,000 award will be grossly out of proportion to the severity of the offense. A physician who

performs an abortion on a minor who he reasonably believes is more than eighteen years old is strictly liable for his conduct, as is a physician who in good faith supplies the mandatory information over the phone to the wrong person. The potential civil liability for even good-faith, reasonable mistakes is more than enough to chill the willingness of physicians to perform abortions in South Dakota. See *Colautti*, 439 U.S. at 396. We therefore hold that Section 34-23A-22 is an undue burden on a woman's right to choose whether to terminate her pre-viability pregnancy.

V.

Planned Parenthood cross-appeals the District Court's decision to uphold South Dakota's mandatory-information provision, S.D.C.L. § 34-23A-10.1. That provision requires that the patient be told the name of the doctor who will perform the abortion, the probable gestational age of the fetus, and the medical risks of both continuing and terminating the pregnancy. It also requires that she be informed that medical assistance benefits may be available for prenatal care and childbirth, that the father would be liable for child support, and that printed materials are available for her to review about fetal development, adoption services, and public-assistance benefits. All of this information must be provided to the patient 24 hours before the abortion, and she must certify in writing that she received it. The only exception to the mandatory-information provision is for a medical emergency.

South Dakota's provision is substantially similar to provisions upheld by the Supreme Court in *Casey* and by this Court in *Fargo Women's Health Organization v. Schafer*. *Casey*, 112 S.Ct. at 2822-26; *Schafer*, 18 F.3d at 532-34. The Pennsylvania provision approved of in *Casey* provided two exceptions not found here: the information on the father's liability for child support could be omitted for rape victims, and other information could be omitted if the physician reasonably believed that providing the information could severely hurt the patient's physical or mental health. 19 Pa. Cons. Stat. Ann. §§ 3205(a)(2)(iii), 3205(c); *Casey*, 112 S.Ct. at 2824. Planned Parenthood contends that the lack of such exceptions in the South Dakota law makes it unconstitutional on its face.

We decided this issue in *Fargo Women's Health Organization v. Schafer*, where we upheld a North Dakota law similar to the one at issue here. *Schafer*, 18 F.3d at 532-34. The North Dakota law also lacked the particular exceptions provided by Pennsylvania, but we held that North Dakota's medical-emergency exception allowed it to pass constitutional muster. *Id.* at 533. Because South Dakota's mandatory-information provision and medical-emergency exception are virtually identical to those we upheld in *Schafer*, Planned Parenthood's argument that they are unconstitutional must fail. Planned Parenthood argues that *Schafer* was wrongly decided, but, as we explained to counsel at the oral argument, this panel is bound by *Schafer*. Under our long-standing practice, only the en banc Court can overrule a prior panel opinion.

VI.

Planned Parenthood also argues that the constitutional portions of South Dakota's Act to Regulate the Performance of Abortion are inextricably intertwined with the unconstitutional penalty provisions. It contends that the prohibition of conduct and the penalties for violating that prohibition are mutually dependent; one cannot stand without the other, despite the Act's severability provision. In short, it argues that if the civil and criminal penalties are unconstitutional, then the entire Act must be struck.

We do not believe that our holding that the criminal and civil penalties are unconstitutional invalidates the entire Act. South Dakota can enforce the constitutional portions of the Act under its pre-existing law. S.D.C.L. § 36-4-30, for example, allows the State to cancel, revoke, or suspend the license of a physician who engages in conduct "unbecoming a person's license to practice medicine." S.D.C.L. § 36-4-30(22). As an intentional violation of the abortion law would presumably be conduct unbecoming to a license to practice medicine, the State can enforce the remaining portions of the Act to Regulate the Performance of Abortion by revoking the medical license of any practitioner who willfully violates them. We therefore decline to strike the Act in its entirety.

VII.

We hold that S.D.C.L. § 34-23A-7, the parental-notice provision of the Act to Regulate the Performance of Abortion, is unconstitutional on its face because it unduly burdens the liberty interests of a large number of mature

minors and of immature minors whose best interests would be served by allowing an abortion without parental notification. We also conclude §§ 34-23A-10.2 and 34-23A-22, the criminal- and civil-penalty provisions of the Act, are unconstitutional because their strict liability chills the willingness of physicians to provide abortions in the state, and thus unduly burdens the right to have a pre-viability abortion. Finally, we uphold Section 34-23A-10.1, the mandatory-information provision, under the authority of *Fargo Women's Health Organization v. Schafer*, 18 F.3d 526 (8th Cir. 1994).

The judgment is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

Filed June 16, 1993
William F. Clayton, Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

PLANNED PARENTHOOD, SIOUX FALLS CLINIC; BUCK J. WILLIAMS, M.D., and WOMEN'S MEDICAL SERVICES, P.C.,	)	CIV. 93-3033
Plaintiffs,	)	ORDER
vs.	)	
WALTER D. MILLER, Governor, and MARK W. BARNETT, Attorney General, in their official capacities,	)	
Defendants.	)	

On June 15, 1993, plaintiffs filed suit in the above-entitled action and moved the court to issue a temporary restraining order and/or a preliminary injunction against enforcement of South Dakota's new law regulating abortions, HB 1131, amending S.D.C.L. §§ 34-23A-1, *et seq.* (hereinafter referred to as "the Act"). The Act is scheduled to take effect on July 1, 1993. Plaintiffs claim that certain provisions of the Act are unconstitutional and seek injunctive relief against its enforcement until the final determination of the merits of this action.

Challenged Provisions of the Act

Plaintiffs first challenge the twenty-four hour delay required before an abortion may be performed. At least twenty-four hours before performing an abortion, the physician who will perform the abortion, or the referring physician, must provide the patient with certain information. S.D.C.L. § 34-23A-10.1 (Supp. 1993). This information includes: the name of the physician who will perform the abortion, particular medical risks associated with the procedure, the probable gestational age of the unborn child at the time of the abortion, and medical risks associated with carrying the pregnancy to term. *Id.* Further, at least twenty-four hours before the abortion, the physician who will perform the abortion, the referring physician, or an agent of either, must also inform the patient concerning: the availability of medicall assistance benefits for prenatal care, childbirth, and neonatal care; liability of the father to assist in supporting the child; the patient's right to review certain printed material developed by the state regarding alternatives to abortion and descriptions of fetal development. *Id.*; S.D.C.L. § 34-23A-10.3 (Supp. 1993).

The Act provides an exception to this twenty-four hour delay in the case of medical emergency. S.D.C.L. § 34-23A-10.1. The Act also states that the required information may be given to the patient telephonically, without a physical examination of the patient. *Id.* Plaintiffs contend that this twenty-four hour delay provision violates the Fourteenth Amendment by placing an "undue burden" on a woman's right to abortion.

Plaintiffs also challenge the parental notification provision. The parental notification provision prohibits the performance of an abortion upon an unemancipated minor or an incompetent adult woman until at least forty-eight hours after written notice to a parent or guardian of the patient. S.D.C.L. § 34-23A-7 (Supp. 1993). The Act allows three exceptions to the parental notification requirement: (1) medical emergencies; (2) the parent or guardian certifies, in writing, that he or she has been notified; or (3), the patient declares that she is an abused or neglected child, and the physician has reported the abuse to the appropriate state agency, as required by South Dakota law. *Id.*

Plaintiffs argue that the parental notification provision is unconstitutional because it lacks any "judicial bypass" mechanism. A judicial bypass mechanism allows a minor to receive an abortion without notification to her parent if she is mature enough to independently make her decision concerning abortion or if notification of her parents would not be in her best interests. Plaintiffs also express concern about certain provisions providing for the civil liability and criminal culpability of those who violate the Act's provisions. Based upon their arguments that the Act is unconstitutional, plaintiffs seek a temporary restraining order and/or a preliminary injunction.

Standards for Injunctive Relief

The standards governing the issuance of a temporary restraining order or a preliminary injunction include: "(1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that

granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest." *Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (preliminary injunction); *S.B. McLaughlin & Co. v. Tudor Oaks Condominium Project*, 877 F.2d 707, 708 (8th Cir. 1989) (temporary restraining order); *see also* Fed.R.Civ.P. 65. When the probability of success on the merits is questionable but "the balance of other factors tips decidedly toward movant[,] a preliminary injunction may issue if movant has raised questions so serious and difficult as to call for more deliberate investigation." *Dataphase Systems*, 640 F.2d at 113.

The case at bar is not unique in the Eighth Circuit. North Dakota has also recently enacted new abortion laws, the North Dakota Abortion Control Act. The North Dakota Abortion Control Act contains provisions similar to some sections of the South Dakota Act challenged in the instant case, and the North Dakota law was also challenged as unconstitutional. Currently, the enforcement of the North Dakota Abortion Control Act is stayed until the Eighth Circuit issues its opinion on the merits of the case. *Fargo Women's Health Org. v. Schaefer*, No. 93-1579 (8th Cir. April 14, 1993).

Plaintiffs have submitted several declarations attesting to the damage that the Act will cause to plaintiffs and their patients. Plaintiffs claim that the Act will place substantial obstacles in the paths of their patients seeking abortions. The alleged obstacles include inordinately increased expenses, loss of confidentiality, difficulty in arranging child care and time away from work, and unwarranted delays. Should the court refuse to issue

injunctive relief and allow the Act take effect on July 1, 1993, plaintiffs assert that they and their patients will suffer immediate and irreparable injury.

Should the court grant injunctive relief, the status quo will be maintained until a full and fair hearing on the merits of this case. The continuation of the status quo for such a short duration should not harm defendants. The court thus finds that the threat of harm to plaintiffs if injunctive relief were denied outweighs any harm caused to defendants by a grant of injunctive relief. Further, the public interest dictates that the court should not allow the enforcement of this Act until a decision is reached on the merits of this case.

The probability of plaintiffs' success on the merits is difficult to gauge at this point, especially given the case pending before the Eighth Circuit concerning the North Dakota Abortion Control Act. However, the court need not calculate plaintiffs' probability of success on the merits with mathematical precision at this early stage. *Dataphase Systems*, 640 F.2d at 113. Because the balance of the other factors tips decidedly toward plaintiffs, and plaintiffs have "raised questions so serious and difficult as to call for more deliberate investigation," the court will grant plaintiffs' request for injunctive relief by granting a temporary restraining order. Therefore, it is

ORDERED that defendants are temporarily restrained from enforcing South Dakota's newly enacted abortion Act, namely HB 1131, amending S.D.C.L. §§ 34-23A-1, *et seq*. This temporary restraining order will take effect on July 1, 1993, the date that the Act was scheduled to take effect. This temporary restraining order

will continue for ten (10) days thereafter or until the date that a hearing is held and a decision filed regarding the motion for preliminary injunction, whichever date is earlier.

Dated June 16, 1993.

BY THE COURT:

/s/ Donald J. Porter
Senior U.S. District Judge

Attest:
William F. Clayton, Clerk
By: /s/ Vicky J. Reinhard
Deputy
(Seal of Court)

Filed June 25, 1993
William F. Clayton
Clerk

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

PLANNED PARENTHOOD, SIOUX FALLS CLINIC; BUCK J. WILLIAMS, M.D., and WOMEN'S MEDICAL SERVICES, P.C.,	)	CIV. 93-3033
Plaintiffs,	)	
vs.	)	SCHEDULING ORDER AND ORDER CONTINUING TEMPORARY INJUNCTION
WALTER D. MILLER, Governor, and MARK W. BARNETT, Attorney General, in their official capacities,	)	
Defendants.	)	

A telephonic status hearing was held on this date and, pursuant to Fed. R. Civ. P. 16(b), the Court requested the suggestions of the parties concerning deadlines for the prompt disposition of this case. Based on the responses received, it is hereby

ORDERED that all discovery in this matter shall be completed on or before August 1, 1993. This means that all discovery requests shall be served so that they may be complied with, within the time permitted by the rules of discovery, by August 1, 1993.

IT IS FURTHER ORDERED that motions to compel discovery shall be filed no later than ten working days after the subject matter of the motion arises. Motions to compel discovery shall not be filed until the parties have complied with D.S.D. LR 37.1

IT IS FURTHER ORDERED that all other motions, except motions in limine concerning questions of evidence, shall be filed on or before August 15, 1993. All motions shall comply with the local rules regarding motions.

IT IS FURTHER ORDERED that, based upon the stipulation of counsel, the temporary injunction restraining enforcement of HB 1131, as more fully described in the order of June 16, 1993, issued by Senior United States District Judge Donald J. Porter, is continued until further order of the Court. It is contemplated that summary judgment motions under Fed. R. Civ. P. 56 and D.S.D. LR 56.1 will be filed by one or both parties by August 15, 1993. This order does not prejudice the right of any party to withdraw its agreement to the temporary injunction at some future time and request a hearing pursuant to Fed. R. Civ. P. 65.

Dated June 25, 1993.

BY THE COURT:

/s/ Richard H. Battey
United States District Judge

Attest:
William F. Clayton, Clerk
By: /s/ Alice R. Raesly
Deputy Clerk
(Seal)

Filed October 28, 1993

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

PLANNED PARENTHOOD, SIOUX FALLS CLINIC; BUCK J. WILLIAMS, M.D., and WOMEN'S MEDICAL SERVICES, P.C.,	)	CIV. 93-3033
Plaintiffs,	)	ORDER DENYING MOTION TO CERTIFY
vs.	)	
WALTER D. MILLER, Governor, and MARK W. BARNETT, Attorney General, in their official capacities,	)	
Defendants.	)	

Defendants have filed a motion to certify certain questions regarding a South Dakota statute to the South Dakota Supreme Court pursuant to South Dakota Codified Law ch. 15-24A. The Court has considered the filings and has concluded that oral argument on the motion is unnecessary. It is hereby

ORDERED that defendants' motion to certify (Docket No. 53) is denied. Pursuant to the Court's order of August 9, 1993, a new scheduling order shall issue forthwith.

Dated this 28th day of October, 1993.

BY THE COURT:

/s/ Richard H. Battey
United States District Judge

ATTEST:
WILLIAM F. CLAYTON, CLERK
By: /s/ Alice R. Raesly
Deputy Clerk
(SEAL)

Filed December 9, 1993
William F. Clayton, Clerk

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

PLANNED PARENTHOOD, SIOUX FALLS CLINIC; BUCK J. WILLIAMS, M.D., and WOMEN'S MEDICAL SERVICES, P.C.,	)	CIV. 93-3033
Plaintiffs,	)	
vs.	)	ORDER
WALTER D. MILLER, Governor, and MARK W. BARNETT, Attorney General, in their official capacities,	)	
Defendants.	)	

Defendants have filed a motion to amend the Court's order of October 28, 1993, denying defendants' motion to certify certain questions to the South Dakota Supreme Court. Defendants seek an amendment to the Court's October 28 order to include language pursuant to 28 U.S.C. § 1292(b) that whether or not to certify questions to the South Dakota Supreme Court "involves a controlling question of law as to which there is substantial ground for difference of opinion and that intermediate appeal from the order may materially advance the ultimate termination of the litigation."

The Court has considered the filings made in connection with the defendants' motion. The choice between

whether this Court or the South Dakota Supreme Court answers certain questions relevant in this case is not a controlling question of law. Both courts would resolve the questions with reference to the same law, so the issue of which court answers the questions is not controlling. Furthermore, certifying this issue for immediate interlocutory appeal will not materially advance the ultimate termination of this litigation, but rather would result in delay. Finally, the Court notes that a party's interlocutory appeal pursuant to 28 U.S.C. § 1292(b) is not a matter of right, but rather rests in the discretion of the district and appellate courts. Accordingly, it is hereby

ORDERED that defendants' motion to amend order denying motion to certify (Docket No. 60) is denied.

Dated this 9th day of December, 1993.

BY THE COURT:

/s/ Richard H. Battey
United States District Judge

ATTEST:
WILLIAM F. CLAYTON, CLERK
By: /s/ Alice R. Raesly
Deputy Clerk
(SEAL)

Filed August 22, 1994
William F. Clayton, Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

PLANNED PARENTHOOD, SIOUX FALLS CLINIC; BUCK J. WILLIAMS, M.D.; and WOMEN'S MEDICAL SERVICES, P.C.,	)	CIV. 93-3033
Plaintiffs,	)	MEMORANDUM OPINION
vs.	)	
WALTER D. MILLER, Governor, and MARK W. BARNETT, Attorney General, in their official capacities,	)	
Defendants.	)	

NATURE AND PROCEDURAL HISTORY

This action was filed by Planned Parenthood, Sioux Falls Clinic; Buck J. Williams, M.D.; and Women's Medical Services, P.C., on June 15, 1993. Defendant is the state of South Dakota, represented by Walter D. Miller and Mark W. Barnett, its governor and attorney general respectively. The complaint challenges the constitutionality of certain parts of Chapter 249 of the South Dakota Session Laws (HB 1131) entitled, "An Act to Regulate the Performance of Abortion," which amends South Dakota Codified Law (SDCL) Chapter 34-23A.

The Court has jurisdiction under 28 U.S.C. § 1331, as the action arises under the constitution and laws of the United States.

HB 1131 was signed by the governor on March 15, 1993, and by operation of law would have become effective July 1, 1993. Prior to its effective date and following a temporary restraining order issued by this Court and stipulation of counsel, the effective date of the act has been stayed pending final determination of the constitutional questions.

Cross motions for summary judgment have been filed on all issues. The motions before the Court consist of defendants' motion to partially vacate stay and for partial summary judgment on the "informed consent" provisions of the statute (Docket #71); plaintiffs' motion for summary judgment concerning the challenge to the statute (Docket #85); and defendants' cross motion for summary judgment on remaining issues and motion to vacate stay (Docket #99).

ISSUES

Plaintiffs challenge section 2[1] of HB 1131 which amended SDCL 34-23A-7 relating to the performance of

---

[1] Section 2 of HB 1131, amending SDCL 34-23A-7, is as follows:

> 34-23A-7. No abortion may be performed upon an unemancipated minor or upon a female for whom a guardian has been appointed because of a finding of incompetency, until at least forty-eight hours after written notice of the pending operation has been delivered in the manner specified in this section. The notice shall be addressed to the parent at the usual place of abode of the parent and delivered personally to the parent by the physician or an agent. In lieu of

an abortion upon an unemancipated minor,[2] providing for a one-parent notification provision without a judicial

---

> such delivery, notice may be made by certified mail addressed to the parent at the usual place of abode of the parent with return receipt requested and restricted delivery to the addressee, which means a postal employee can only deliver the mail to the authorized addressee. If notice is made by certified mail, the time of delivery shall be deemed to occur at twelve o'clock noon on the next day on which regular mail delivery takes place, subsequent to mailing.
> No notice is required under this section if:
> (1) The attending physician certifies in the pregnant minor's medical record that, on the basis of the physician's good faith clinical judgment, a medical emergency exists that so complicates the medical condition of a pregnant female as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function and there is insufficient time to provide the required notice; or
> (2) The person who is entitled to notice certifies in writing that he has been notified; or
> (3) The pregnant minor declares, or provides information that indicates, that she is an abused or neglected child as defined in § 26-8A-2 and the attending physician has reported the alleged or suspected abuse or neglect as required in accordance with §§ 26-8A-3, 26-8A-6 and 26-8A-8. In such circumstances, the department of social services, the state's attorney and law enforcement officers to whom the report is made or referred for investigation or litigation shall maintain the confidentiality of the fact that she has sought or obtained an abortion and shall take all necessary steps to ensure that this information is not revealed to her parents.

[2] SDCL 25-5-24 defines an emancipated minor as any person under the age of eighteen years who:

bypass. Challenge is also made to that part of SDCL 34-23A-10.1[3] which provides for a 24-hour wait and

---

(1) Has entered into valid marriage, whether or not such marriage was terminated by dissolution; or

. . .

(3) Has received a declaration of emancipation pursuant to § 25-5-26.

SDCL 25-5-25. Age of majority for certain purposes – Parent or guardian liability. An emancipated minor shall be considered as being over the age of majority for the following purposes:

(1) For the purpose of consenting to medical, chiropractic, optometric, dental or psychiatric care, without parental consent, knowledge or liability; . . .

[3] Section 4 of HB 1131 amending SDCL 34-23A-10.1 reads as follows:

34-23A-10.1. No abortion may be performed except with the voluntary and informed consent of the female upon whom the abortion is to be performed. Except in the case of a medical emergency, consent to an abortion is voluntary and informed only if:

(1) The female is told the following by the physician who is to perform the abortion or by the referring physician, at least twenty-four hours before the abortion:

(a) The name of the physician who will perform the abortion;

(b) The particular medical risks associated with the particular abortion procedure to be employed including, when medically accurate, the risks of infection, hemorrhage, danger to subsequent pregnancies and infertility;

(c) The probable gestational age of the unborn child at the time the abortion is to be performed; and

(d) The medical risks associated with carrying her child to term;

notice under the informed consent statute. SDCL 34-23A-10.1(1) and (2). The next challenge is to

---

(2) The female is informed, by telephone or in person, by the physician who is to perform the abortion, by the referring physician, or by an agent of either, at least twenty-four hours before the abortion:

(a) That medical assistance benefits may be available for prenatal care, childbirth and neonatal care;

(b) That the father is liable to assist in the support of her child, even in instances in which the father has offered to pay for the abortion; and

(c) That she has the right to review the printed materials described in section 5 of this Act [SDCL 34-23A-10.3]. The physician or his agent shall orally inform the female that the materials have been provided by the State of South Dakota. If the female chooses to view the materials, they shall either be given to her at least twenty-four hours before the abortion or mailed to her at least seventy-two hours before the abortion by certified mail, restricted delivery to addressee, which means the postal employee can only deliver the mail to the addressee;

(3) The female certifies in writing, prior to the abortion, that the information described in subdivisions (1) and (2) of this section has been furnished her, and that she has been informed of her opportunity to review the information described in section 5 of this Act; and

(4) Prior to the performance of the abortion, the physician who is to perform the abortion or his agent receives a copy of the written certification prescribed by subdivision (3).

section 7[4] which amended SDCL 34-23A-10.2 to provide a criminal penalty for a violation of SDCL 34-23A-7 (one-parent notification), SDCL 34-23A-10.1 (informed consent), section 6[5] (medical emergency). Finally, challenge is

---

The physician may provide the information prescribed in subdivision (1) by telephone without conducting a physical examination or tests of the patient, in which case the information required to be supplied may be based on facts supplied the physician by the female and whatever other relevant information is reasonably available to the physician.

[4] Section 7 of HB 1131, amending SDCL 34-23A-10.2, is as follows:

34-23A-10.2. A physician who violates § 34-23A-7, 34-23A-10.1 or section 6 of this Act is guilty of a Class 2 misdemeanor. The court in which a conviction of a violation of § 34-23A-7, § 34-23A-10.1 or section 6 of this Act occurs shall report such conviction to the board of medical and osteopathic examiners.

No penalty may be assessed against the female upon whom the abortion is performed or attempted to be performed. No criminal penalty or civil liability for failure to comply with § 34-23A-10.1(2)(c) or that portion of § 34-23A-10.1(3) requiring a written certification that the woman has been informed of her opportunity to review the information referred to in § 34-23A-10.1(2)(c) may be assessed unless the department of health has made the printed materials available at the time the physician or his agent is required to inform the female of her right to review them.

[5] Section 6 of HB 1131 added a new section 34-23A-2.1 as follows:

If a medical emergency compels the performance of an abortion, the physician shall inform the female, prior to the abortion if possible, of the medical indications supporting his judgment that an abortion is necessary to avert her death or that a delay will create

made to section 8[6] which amended SDCL 34-23A-22 providing for civil punitive and treble actual damages when an abortion is performed in violation of the provisions of sections 34-23A-2.1, 34-23A-7, and 34-23A-10.1.

---

serious risk of substantial and irreversible impairment of a major bodily function.

[6] Section 8 of HB 1131 added a new section 34-23A-22 as follows:

If any abortion occurs which is not in compliance with §§ 34-23-7 [sic], 34-23A-10.1 or section 6 of this Act, the person upon whom such an abortion has been performed, and the parent of a minor child upon whom such an abortion was performed, or any of them, may maintain an action against the person who performed the abortion for ten thousand dollars in punitive damages and treble whatever actual damages the plaintiff may have sustained. Any person upon whom such an abortion has been attempted may maintain an action against the person who attempted to perform the abortion for five thousand dollars in punitive damages and treble whatever actual damages the plaintiff may have sustained.

If judgment is rendered in favor of the plaintiff in any such action, the court shall also render judgment for a reasonable attorney's fee in favor of the plaintiff against the defendant. If judgment is rendered in favor of the defendant and the court finds that the plaintiff's suit was frivolous and brought in bad faith, the court shall also render judgment for a reasonable attorney's fee in favor of the defendant against the plaintiff.

SUMMARY JUDGMENT STANDARD

This case comes before the Court pursuant to Rule 56 of the Federal Rules of Civil Procedure providing for summary judgment.

Under the summary judgment standard to be applied by the Court, the Court is guided by the trilogy of *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The Court is also mindful of *Commercial Union Insurance Co. v. Schmidt*, 967 F.2d 270, 271-72 (8th Cir. 1992), where the court outlined the summary judgment procedure.[7]

---

[7] Once the motion for summary judgment is made and supported, it places an affirmative burden on the non-moving party to go beyond the pleadings and "by affidavit or otherwise" designate "specific facts showing that there is a genuine issue for trial." In designating specific facts, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment" because Rule 56(c) requires "that there be no *genuine* issue of *material* fact." In order to determine which facts are material, courts should look to the substantive law in a dispute and identify the facts which are critical to the outcome. A dispute about a material fact is genuine if the evidence is such that a reasonable trier of fact could return a decision in favor of the party opposing summary judgment. In performing the genuineness inquiry, trial courts should believe the evidence of the party opposing summary judgment and all justifiable inferences should be drawn in that party's favor. A court is not to "weigh the evidence and determine the truth of the matter but [instead should] determine whether there is a genuine issue for trial." (Citations omitted.)

The Court understands that a decision granting summary judgment is subject to review de novo. *Gumersell v. Director Fed. Emergency Management Agency*, 950 F.2d 550, 553 (8th Cir. 1991).

FINDINGS OF FACT

The Court finds the following undisputed facts:

1. Buck Williams, M.D., Sioux Falls, South Dakota, is the only physician providing abortion services within the exterior boundaries of South Dakota.

2. Dr. Williams is the only physician providing abortion services in a 235-mile radius of Sioux Falls, which includes the four contiguous states of Minnesota, North Dakota, Nebraska, and Iowa.

3. Dr. Williams currently provides abortions as a one-day service. Abortions are commonly scheduled by telephone on one day and the abortion is provided on another day.

4. During 1991, the latest year for which statistics are available, 486 South Dakota residents received abortions in neighboring states, and 774 South Dakota residents received abortions from Dr. Williams.

5. Approximately 17 percent of the total South Dakota women receiving abortions travel 300 miles or more each way.

6. Patients travel from the extreme western border of the state of South Dakota from cities and towns located in the Black Hills area, a distance of over 300 miles.

7. The Court takes judicial notice of the fact that travel from Rapid City to Sioux Falls via Interstate 90 is 340 miles.

8. Approximately 25 percent of Dr. Williams' patients are women below the federal poverty level.

9. South Dakota has a higher rate of poverty than the national average, including a higher rate of poverty among female head of household with children under five and a higher rate of poverty among its Native American population.

10. Many of Dr. Williams' patients are single women who already have children.

11. Two full days of absence entails loss of hourly wages, child care expenses, and travel expenses and lodging.

12. Confidentiality is a paramount concern for many abortion patients.

13. A telephone interview would approximate three to fifteen minutes, depending upon the questions of the patient.

DISCUSSION

1. Background

It has been the law since 1973 that there is a right of privacy, a liberty interest protecting a female's right to decide whether to terminate her pregnancy, arising under the Due Process Clause of the Fourteenth Amendment to the Constitution. *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).

This is not to say that this right is absolute and unqualified. *Roe* recognized that the state has certain rights to be asserted in the abortion decision. *Id.* at 727. These rights, however, may be justified only by a "compelling state interest." Legislative enactments must be narrowly drawn to express only the legitimate interests at stake. *Id.* at 728 (citing *Griswold v. Connecticut*, 381 U.S. 479, 485, 85 S.Ct. 1678, 1682, 14 L.Ed.2d 510 (1965)), and other cases.

After twenty-one years, the basic holdings of *Roe* were reaffirmed by *Planned Parenthood of Southeastern Pennsylvania v. Casey*, ___ U.S. ___, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) in the joint opinion of Justices O'Connor, Kennedy, and Souter, joined in part by Justices Stevens and Blackmun. Chief Justice Rehnquist and Justices White, Scalia, and Thomas dissented. To be sure, not all of *Roe*'s holdings have been sustained. *Casey* overruled the strict scrutiny test of *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983) (*Akron I*). *Casey*, 112 S.Ct. at 2817. It also held *Roe*'s trimester framework too rigid and unnecessary. It further clarified the state's involvement in the abortion decision during the first trimester as interpreted in *Roe* by holding the state is not prohibited from regulations which would ensure a thoughtful and informed choice to terminate pregnancy, even during the first trimester. *Id.* at 2818. The joint opinion held that "[o]nly where state regulation imposes an *undue burden* on a woman's ability to make this abortion decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause." *Id.* at 2819 (emphasis supplied).

2. One-Parent Notification Provision Without Bypass.

A minor is entitled to a supervised bypass or waiver proceeding to obviate the necessity for parental notice. A court is the usual bypass agency, but it need not be the exclusive one. The purpose of such a proceeding is for the minor to show that she is of sufficient maturity[8] to appreciate the importance of her decision (mature minor) or if she is not of sufficient maturity to make the decision independently, nonetheless the abortion decision without parental notice is in her best interest (best interest minor). Such proceeding must provide for an expeditious resolution of the abortion decision. The minor's confidentiality must also be protected. Whatever procedure is used, it must ensure that parental notice does not amount in fact to a parental veto. *Bellotti v. Baird*, 443 U.S. 622, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979) (*Bellotti II*).

It is with this background in mind that the Court considers the constitutionality of HB 1131 containing a one-parent notification provision but which does not provide for a supervised bypass procedure. The Court is aided by precedent. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed. 2d 788 (1976) (spousal consent provision and a blanket parental consent requirement held unconstitutional); *H.L. v. Matheson*, 450 U.S. 398, 101 S.Ct. 1164, 67 L.Ed.2d 388 (1981) (Utah

---

[8] South Dakota implicitly recognizes the maturity of a 16 year old female to make the decision to give her consent to sexual intercourse. *See* SDCL 22-22-1(5). The age of consent was decreased from 18 years to 16 years in 1972 by chapter 154, section 21, 1972 session laws. *See State v. Heisinger*, 252 N.W.2d 899, 902 (S.D. 1977).

statute as applied to an unemancipated minor living with and dependent upon her parents and making no claim or showing as to her maturity or as to her relations with her parents held constitutional); *Akron I*, 103 S.Ct. at 2499, (Ohio statute requiring parental consent on all second trimester minors is unconstitutional without adequate court bypass); *Hodgson v. Minnesota*, 497 U.S. 417, 110 S.Ct. 2926, 111 L.Ed.2d 344 (1990) (both parents' notification requirement of minor's abortion decision without judicial bypass is unconstitutional); *Planned Parenthood Ass'n of Kansas City, Mo. v. Ashcroft*, 655 F.2d 848, 859 (8th Cir. 1981) (provision of statute requiring notice to parents of all minors is unconstitutional because it requires notice to parents of minors who are mature or for whom it is not in their best interest to give notice).

The parties cite no authority and the Court has been unable to find authority which establishes that a one-parent notice provision without judicial bypass such as found in SDCL 34-23A-7 is constitutional. In *Hodgson v. Minnesota*, 853 F.2d 1452 (8th Cir. 1988) (en banc), *aff'd*, 497 U.S. 417, 110 S.Ct. 2926, 111 L.Ed.2d 344 (1990), the Court considered a Minnesota statute which required a minor to notify her parents of her desire to obtain an abortion or to seek judicial bypass. The Minnesota district court held the statute *as applied* as unconstitutional. The Supreme Court concluded that the Minnesota statutory plan which included a judicial bypass was constitutional and complied with the principles announced in *Bellotti II*, *Ashcroft*, and *Matheson*. *Hodgson*, 110 S.Ct. at 2947.

SDCL 34-23A-7 requires notice only to one parent.[9] It is less restrictive upon the abortion decision than the statute considered in *Hodgson*. Whether there is a one-parent or a two-parent notice provision under the Minnesota statute in *Hodgson* is immaterial in the face of a lack of adequate bypass procedure. Accordingly, this Court focuses on the lack of bypass.

State and parental interests must yield to the constitutional right of a mature minor, or of an immature minor whose best interests are contrary to parental involvement, to obtain an abortion without consulting or notifying the parent or parents. *Hodgson*, 853 F.2d at 1455 (citing *Akron I*, 103 S.Ct. at 2491 n.10). Thus, if parental involvement is encouraged by the state it must provide an alternate procedure to which a minor mature enough to make her own decision may turn or to show, if not considered "mature," that the abortion is in her "best interests." *Hodgson*, 853 F.2d at 1456.

Tested by these authorities, this Court holds SDCL 34-23A-7 (chapter 249 1993 session laws, section 2) unconstitutional in not providing such a bypass. The statutory omission constitutes an undue burden on the minor's privacy right to make the abortion decision.

The state attempts to convince the Court that SDCL 26-8A-2[10] defining an "abused and neglected child,"

---

[9] SDCL 34-23A-1(3). "Parent," one parent of the pregnant minor or the guardian or conservator of the pregnant female.

[10] 26-8A-2. Abused or neglected child defined. In this chapter and chapter 26-7A, the term "abused or neglected child" means a child:

when construed together with SDCL 34-23A-7(3), constitutes an effective "doctor bypass" for the "best interest" minor. The state contends this doctor bypass saves the statute from constitutional challenge. The state's position is that when information is given which indicates that the minor is abused or neglected, the physician is given statutory authority under SDCL 34-23A-7(3) to perform the abortion without parental notification. The Court is

---

(1) Whose parent, guardian, or custodian has abandoned the child or has subjected the child to mistreatment or abuse;
(2) Who lacks proper parental care through the actions or omissions of the child's parent, guardian or custodian;
(3) Whose environment is injurious to the child's welfare;
(4) Whose parent, guardian or custodian fails or refuses to provide proper or necessary subsistence, supervision, education, medical care or any other care necessary for the child's health, guidance or well-being;
(5) Who is homeless, without proper care or not domiciled with the child's parent, guardian or custodian through no fault of the child's parent, guardian or custodian;
(6) Who is threatened with substantial harm;
(7) Who has sustained emotional harm or mental injury as indicated by an injury to the child's intellectual or psychological capacity evidenced by an observable and substantial impairment in the child's ability to function within the child's normal range of performance and behavior, with due regard to the child's culture; or
(8) Who is subject to sexual abuse, sexual molestation or sexual exploitation by the child's parent, guardian, custodian or any other person responsible for the child's care.

not persuaded. The state's argument proceeds on a false premise, namely, that all pregnant minors, including "mature minors" or "best interest minors" fall within the statutory classification of "abused and neglected children." Thus the state would have the Court apply the statute too narrowly. An effective, alternative bypass procedure would place the decision in the hands of a neutral and detached agency such as a court which would be able to take into consideration the competing interests involved in the abortion decision. This is not to say that a court or other bypass agency has a veto on the abortion decision any more than does the parent. The bypass authority is limited to a factual finding of whether the minor is of sufficient maturity to make the abortion decision or whether the decision is in her best interest. If either a finding of "maturity" or "best interest" is made, the notice is simply not given to the parent. The abortion proceeds without such notice.

The physician performing the abortion can hardly be said to be the neutral and detached agency performing the bypass function. Furthermore, a minor's pregnancy does not automatically reduce the minor to the status of being "abused and neglected." The state's "doctor bypass" theory is unsupported by authority and is overreaching by the state in an attempt to explain the lack of a bypass alternative. To require a minor to be declared an "abused or neglected child" under SDCL 26-8A-2 by reason of the status of being pregnant simply burdens her constitutionally protected right of privacy. The Court finds the statute unconstitutional.

3. 48-Hour Wait

SDCL 34-23A-7 provides that "no abortion may be performed upon an unemancipated minor or upon a female for whom a guardian has been appointed because of a finding of incompetency, until at least forty-eight hours after written notice of the pending operation has been delivered in the manner specified in this section." The statute then authorizes notice to be delivered personally to the parent by either the physician or an agent of the physician. In lieu of personal delivery notice may be made by certified mail. It also provides for an exception in the case of (1) medical emergency; (2) waiver of notice; or (3) a declaration that the minor is an abused or neglected child as defined in SDCL 26-8A-2 which has been reported to appropriate authorities.

In *Hodgson*, 110 S.Ct. at 2929, the Court discussed the rationale for such waiting period. The Court held that "[t]o the extent that . . . the state statute requires that a minor wait 48 hours after notifying a single parent of her intention to obtain an abortion, it reasonably furthers the legitimate state interest in ensuring that the minor's decision is knowing and intelligent." The decision in *Hodgson* forecloses the issue of the 48-hour wait as it pertains to an unemancipated minor. The Court therefore finds the 48-hour waiting period constitutional. It strikes the balance between the competing interests involved.

4. Civil Penalty Provision

HB 1131 added a new section providing for a civil cause of action against a person who performs an abortion without complying with the requirements of the statute. The section provides in part that the parent of a minor child or the minor child "may maintain an action against the person who performed the abortion for ten thousand dollars in punitive damages and treble whatever actual damages the plaintiff may have sustained. Any person upon whom such an abortion has been attempted may maintain an action against the person who attempted to perform the abortion for five thousand dollars in punitive damages and treble whatever actual damages the plaintiff may have sustained." The statute further provides for a judgment of reasonable attorney's fees in favor of the plaintiff, or in the case of a suit that was found to be frivolous and brought in bad faith, attorney's fees are awardable in favor of defendant as against the plaintiff. SDCL 34-23A-22.

The statute appears to be substantially the same and perhaps taken from the North Dakota Century Code, chapter 14-02.1-03.2.[11] The issue of the constitutionality of

---

[11] 14-02-1.03.2 Civil damages for performance of abortions without informed consent.

Any person upon whom an abortion has been performed without informed consent as required by sections 14-02.1-02, 14-02.1-02.1, subsection 1 of section 14-02.1-03, 14-02.1-03.2, and 14-02.1-03.3 may maintain an action against the person who performed the abortion for ten thousand dollars in punitive damages and treble whatever actual damages the plaintiff

the North Dakota statute was not raised by the parties in *Fargo Women's Health Organization v. Sinner*, 819 F.Supp. 862 (D.N.D. 1993).[12]

The state's position is that the punitive damage award constitutes an upper limit or a "cap" on damages

---

may have sustained. Any person upon whom an abortion has been attempted without complying with sections 14-02.1-02, 14-02.1-02.1, subsection 1 of section 14-02.1-03, 14-02.1-03.2 and 14-02.1-03.3 may maintain an action against the person who attempted to perform the abortion for five thousand dollars in punitive damages and treble whatever actual damages the plaintiff may have sustained.

[12] In addition to the North Dakota statute, provisions in other states provide civil penalties to a greater or lesser degree. Tennessee Code Annotated, section 37-10-307, provides in part, "The law of this state shall not be construed to preclude the award of exemplary damages in any appropriate civil action relevant to violations of this part [parental consent for abortion by minors]." West's Wisconsin Statutes Annotated, section 895.037 provides a penalty provision which reads in part, "Any person who . . . intentionally performs or induces an abortion on or for a minor whom the person knows or has reason to know is not an emancipated minor may be required to forfeit not more than $10,000."
Pennsylvania Consolidated Statutes Annotated, section 3217, provides in part, "Any physician who knowingly violates any of the provisions of section 3204 (relating to medical consultation and judgment) or 3205 (relating to informed consent) shall, in addition to any other penalty prescribed in this chapter, be civilly liable to his patient for any damages caused thereby and, in addition, shall be liable to his patient for punitive damages in the amount of $5,000, . . . "
Finally, the Code of Laws of South Carolina, section 44-41-35, provides in part, "The law of this State does not preclude the award of exemplary damages in an appropriate civil action relevant to violations concerning a minor."

and a court could, pursuant to the statute,[13] award less than $10,000 or less than $5,000 in case of an attempt. The clear and unambiguous wording of the statute provides for a strict liability of the $10,000 and $5,000 damages amount. If the legislature had intended these amounts to be only a cap, it knew how to use proper language to accomplish its intent. When in 1986 the legislature set a limitation on damages in medical malpractice actions of $1 million in total damages, it said, "damages which may be awarded *may not exceed* the sum of one million dollars." SDCL 21-3-11 (emphasis supplied). No such form of the language appears in newly-enacted SDCL 34-23A-22. The state attempts to buttress its position by the argument that the courts of South Dakota would interpret this section with reference to other South Dakota punitive damage statutes. Such argument misses the point. SDCL 34-23A-22 is clear and unambiguous. Because it is clear and unambiguous, the Court cannot resort to rules of statutory construction to determine its true meaning. The Supreme Court of South Dakota stated:

> The purpose of statutory construction is to discover the true intention of the law which is to be ascertained primarily from the language expressed in the statute. The intent of a statute is determined from what the legislature said, rather than what the courts think it should have said, and the court must confine itself to the language used.
>
> Words and phrases in a statute must be given their plain meaning and effect. When the language of a statute is clear, certain and unambiguous, there is no reason for construction, and the Court's only function is to declare the meaning of the statute as clearly expressed.

US West Communications v. Public Utilities Commission, 505 N.W.2d 115, 123 (S.D. 1993) (citing *Appeal of AT&T Info. Sys.*, 405 N.W.2d 24 (S.D. 1987)). Accordingly, the Court can only conclude the statute to be a strict liability statute which chills the abortion decision. The statute, providing as it does for strict liability, constitutes a constitutionally impermissible obstacle to the woman's abortion decision. South Dakota has one physician providing abortion services. If this statutory provision is allowed to stand, there may not be any provider willing to subject himself or herself to the vagaries of the statute. What then would be the choice remaining for those women who desire to exercise their constitutional rights consistent with *Roe* and *Casey*? The Court finds that SDCL 34-23A-22 is unconstitutional.

5. Informed Consent

The state's informed consent provision is SDCL 34-23A-10.1(1)-(4). The statute merely codifies, in the abortion context, what in the absence of such context would be the duty of a physician performing any medical procedure. Physicians practicing in South Dakota have a common law duty to ensure that their patients' consent to

[13] The statute providing for both treble damages and punitive damages of $10,000 may itself be contrary to the law of South Dakota. As late as 1993 the South Dakota Supreme Court held that where a statute provided for double damages, further punitive damages are not recoverable. *Nelson v. WEB Water Dev. Ass'n, Inc.*, 507 N.W.2d 691 (S.D. 1993). That issue, however, is not before this Court.

medical treatment is informed. According to the South Dakota Supreme Court,

> A doctor has the duty to make a reasonable disclosure to his patient of the significant risks in view of the gravity of the patient's condition, the probabilities of success, and any alternative treatment or procedures, if such are reasonably appropriate, so that the patient has the information reasonably necessary to form the basis of an intelligent and informed consent to the proposed treatment or procedure.

Cunningham v. Yankton Clinic, P.A., 262 N.W.2d 508, 511 (S.D. 1978). The failure by a physician to obtain informed consent in the case of any medical treatment could expose the physician to a malpractice tort claim and its consequent damages of up to $1 million. Thus, since a physician is already required to disclose this type of information under the common law, the disclosure required by SDCL 34-23A-10.1(1)-(4) does not substantially interfere with the woman's right of choice.[14] This is the type of information which would have to be included in a reasonable disclosure absent such a statute. The statute merely defines what otherwise would be required in a properly informed consent decision. It therefore may reasonably offer the physician more and not less protection from malpractice claims. Arguably, a greater number

---

[14] While the Court has some concern over the impact of SDCL 34-23A-10(2)(c) which refers to the review of printed material described in SDCL 34-23A-10.3 upon the abortion decision, the fact that the female has a right to either choose or refuse such material saves the provision from constitutional infirmity.

of physicians, not fewer, will be willing to provide abortion services.

A state's interest in potential life may be advanced by the enactment of legislation designed to ensure that a woman's decision to terminate a pregnancy will be informed. *Casey*, 112 S.Ct. at 2821. The legislation, however, may not constitute an undue burden on the woman's choice. *Id.* at 2820. Several cases have considered the constitutionality of the informed consent legislation which has been enacted by various states. *Id.* at 2826 (holding the Pennsylvania informed consent statute constitutional because it was not unduly burdensome); *Barnes v. Moore*, 970 F.2d 12, 15 (5th Cir. 1992) (holding the Mississippi informed consent statute constitutional due to its similarity to the Pennsylvania statute); *Fargo Women's Health Org. v. Schafer*, 18 F.3d 526, 530 (8th Cir. 1994) (holding the North Dakota informed consent statute constitutional due to its similarity to the Pennsylvania statute and because it was not unduly burdensome).

SDCL 34-23A-10.1(1)-(4) contains provisions substantially similar to the statutes which have been declared constitutional in *Casey*, *Barnes*, and *Schafer*. In addition, the alleged impact of the statute is also substantially similar to the impact found by the district court in *Casey*.

In analyzing a Utah informed consent statute, the Utah district court said,

> Where a state passes abortion legislation which is less than or equal to the restrictions imposed by the Pennsylvania law, and where the plaintiffs are unable to allege any impact from the legislation which is more burdensome than was

found by the district court in *Casey*, there is no viable cause of action.

Utah Women's Clinic, Inc. v. Leavitt, 844 F.Supp. 1482, 1491 (D. Utah 1994).

The South Dakota statute dictates certain information be provided to the woman before she can effectively give informed consent. This information includes the name of the doctor who will perform the abortion, the risks associated with the abortion procedure and with continuing the pregnancy, and the probable gestational age of the fetus. This information must be given by either the physician who will perform the abortion or the referring physician. In *Casey*, the Supreme Court overruled the sections of *Akron I*, 103 S.Ct. at 2481 and *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 106 S.Ct. 2169, 90 L.Ed.2d 779 (1986) which held that a state could not require a physician to provide a woman with certain information designated to dissuade her from having an abortion. *Casey*, 112 S.Ct. at 2823. The Supreme Court held that requiring a doctor to make certain information available to the woman is permissible as long as the information is truthful and not misleading. *Id.* at 2823. Requiring certain information be made available was not an undue burden. *Id.* at 2824.

6. Criminal Penalty

SDCL 22-6-2 divides misdemeanor crimes into two classes, distinguished by the penalty of the violation. A Class 1 misdemeanor carries with it a penalty of one year imprisonment in a county jail, a $1,000 fine, or both. A

Class 2 misdemeanor provides for thirty-day imprisonment in a county jail, a $100 fine, or both. A Class 2 misdemeanor with its permitted loss of liberty is not a minimum sanction. South Dakota also provides for petty offenses, e.g., speeding and the like. Petty offenses are civil proceedings and are governed by the procedure set forth in SDCL 23-1A. *See* SDCL 22-6-7. Petty offenses are not crimes. A misdemeanor, whether Class 1 or Class 2, is a crime.

A physician who violates SDCL 34-23A-2.1 (medical emergency), 34-23A-7 (abortion on unemancipated minor), or SDCL 34-23A-10.1 (abortion without informed consent) is guilty of a Class 2 misdemeanor. The court in which a conviction occurs is required to report such conviction to the Board of Medical and Osteopathic Examiners. SDCL 34-23A-10.2. This penalty clause carries with it severe implications to the physician involving a risk of loss of personal liberty and the license to practice medicine.

On its face SDCL 34-23A-10.2 does not contain a scienter requirement. To this the state agrees. The state argues that a South Dakota court in the application of the statute will infer, and therefore include, a scienter clause. Such assurance is of little comfort to a physician who desires to conform his conduct to the law.

In referring to the words "motor vehicle" used in the Motor Vehicle Theft Act (18 U.S.C § 408), Mr. Justice Holmes stated, "[I]t is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible, the line should be clear. . . . " *McBoyle v.*

United States, 283 U.S. 25, 51 S.Ct. 340, 341, 75 L.Ed. 816 (1931). The early case of *McBoyle* was quoted with approval as late as 1994 in *Ratzlaf v. United States*, ___ U.S. ___, 114 S.Ct. 655, 663, 126 L.Ed.2d 615 (1994).

The question to this Court then is: By what standard would a physician's conduct be judged under SDCL 34-23A-10.2? While a South Dakota court may include a scienter requirement of "knowingly" or "willfully" or perhaps some other term describing the mental state required, why should a physician desiring to comply with the law in good faith have to guess at his or her peril as to how a court will define the scienter requirement? The posing of the question seems to suggest the answer. The statute as drawn acts as a chilling effect upon a physician's desire to continue performing abortions under the law as written. This may be especially chilling in a state such as South Dakota where, at the present time, there is only one physician willing to perform abortions. It seems to this Court that where a basic constitutional right of the female is involved, that the chilling effect becomes much more significant as it impacts the abortion decision and the ability to find competent physicians to perform the procedure. Accordingly, the Court finds that the statute is vague, uncertain, and lacks an accurate definition of the mental state required. It is simply another obstacle placed upon a woman's privacy right. The Court finds that SDCL 34-23A-10.2 is unconstitutional.

7. 24-Hour Waiting Period of SDCL 34-23A-10.1(2)

Plaintiffs' position is that the South Dakota informed consent provision is unduly burdensome in that it

requires the doctor who is to perform the abortion or the referring doctor to provide the patient with certain information 24 hours before the abortion, either by phone or in person. According to plaintiffs, this would impose an undue burden because Dr. Williams is the only doctor in South Dakota who performs abortions. It would take him seven hours a week to make the required phone calls, and this would cause him to lose revenue which would have to be passed on to his patients at an increased cost of $60 per abortion.

Both the Pennsylvania and the Mississippi statutes require the similar information be provided by a physician. In analyzing the Pennsylvania statute, the Supreme Court held that to require a doctor to give information is not an undue burden. It is a reasonable way to assure informed consent. *Casey*, 112 S.Ct. at 2824-25. The statute at issue in *Casey* was even more restrictive than the statute at issue in this case. In Pennsylvania, there is no provision allowing notification by phone. Thus, two trips to the doctor are required before an abortion may be performed. *Id.* at 2825. The Supreme Court held, nevertheless, that the increased costs which this would cause were not a substantial obstacle. *Id.* at 2825. In addition, the South Dakota statute does allow for the referring physician to inform the woman of this information. Thus, Dr. Williams personally would not necessarily have to contact all of his patients. The doctor notification requirement is not an undue burden. The 24-hour waiting period of SDCL 34-23A-10.1(2) is not unconstitutional.

8. Exception for Rape Victims

Finally, plaintiffs contend that the fact that the South Dakota statute has no exception for rape victims or for women upon whom the information would have an adverse effect makes the statute unconstitutional under *Casey*.

The Pennsylvania informed consent statute provides,

> No physician shall be guilty of violating this section for failure to furnish the information required by subsection (a) if he or she can demonstrate, by a preponderance of the evidence, that he or she reasonably believed that furnishing the information would have resulted in a severely adverse effect on the physical or mental health of the patient.

18 Pa. Cons. Stat. Ann. § 3205(c). Although the Mississippi, North Dakota, and South Dakota statutes do not contain this exact language, these statutes do have similar exceptions for the health of the woman. These statutes all contain a medical emergency exception which provides that the requirements of the informed consent statute do not apply in the case of a medical emergency. Miss. Code Ann. § 41-41-33; N.D. Cent. Code § 14-02.1-03; SDCL 34-23A-10.1. According to the Eighth Circuit Court of Appeals, this exception for the health of the woman is similar to the Pennsylvania exception. *Schafer*, 18 F.3d at 533.

The Pennsylvania statute also has a provision which allows information concerning a father's liability for child support to be omitted when the woman seeking the abortion had been raped. 18 Pa. Cons. Stat. Ann.

§ 3205(a)(2)(iii). The rape exception is not present in the Mississippi statute analyzed in *Barnes*, in the North Dakota statute analyzed in *Schafer*, or in the South Dakota statute. The Eighth Circuit Court of Appeals and the Fifth Circuit Court of Appeals declined to find this exception necessary to the constitutionality of the statutes considered. *Schafer*, 18 F.3d at 534; *Barnes*, 970 F.2d at 15. Therefore, this Court also must find that the rape exception is not essential to hold the South Dakota statute constitutional.

CONCLUSION

The Court concludes that defendants' motion to vacate stay and for partial summary judgment will be granted. The Court finds that SDCL 34-23A-10.1 is constitutional.

The Court concludes that plaintiffs' motion for summary judgment declaring the provisions of SDCL 34-23A-7 unconstitutional in not providing a bypass is granted.

The Court concludes that plaintiffs' motion for summary judgment declaring SDCL 34-23A-22 and the penalty portion of SDCL 34-23A-10.2 as unconstitutional is granted.

Judgment shall be entered accordingly.

Dated this 22d day of August, 1994.

BY THE COURT:

/s/ Richard H. Battey
Chief Judge

Attest:

William F. Clayton, Clerk
By: /s/ Alice R. Raesly
Deputy Clerk

(Seal)

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

PLANNED PARENTHOOD, SIOUX FALLS CLINIC; BUCK J. WILLIAMS, M.D.; AND WOMEN'S MEDICAL SERVICES, P.C.,	)	CIV. 93-3033
Plaintiffs,	)	JUDGMENT
vs.	)	
WALTER D. MILLER, GOVERNOR, AND MARK W. BARNETT, ATTORNEY GENERAL, IN THEIR OFFICIAL CAPACITIES,	)	
Defendants.	)	

Based upon the memorandum opinion of this date, it is hereby

ORDERED AND ADJUDGED that the penalty provision of SDCL 34-23A-10.2 is unconstitutional.

IT IS FURTHER ORDERED AND ADJUDGED that SDCL 34-23A-7 is unconstitutional in not providing a bypass procedure.

IT IS FURTHER ORDERED AND ADJUDGED that SDCL 34-23A-22 is unconstitutional.

IT IS FURTHER ORDERED AND ADJUDGED that SDCL 34-23A-10.1 is constitutional.

IT IS FURTHER ORDERED AND ADJUDGED that defendants are hereby restrained from enforcing SDCL 34-23A-10.2, 34-23A-22, and 34-23A-7.

The restraining order heretofore issued restraining the state from enforcing SDCL 34-23A-10.1 is dismissed.

IT IS FURTHER ORDERED that each party shall assume their respective costs.

Dated this 22d day of August, 1994.

BY THE COURT:

/s/ Richard H. Battey
Chief Judge

Attest:

William F. Clayton, Clerk
By: /s/ Alice R. Raesly
Deputy Clerk

(Seal)

SDCL 34-23A-7. Forty-eight hour notice to parent or guardian for minor or incompetent female – Delivery of notice – Exceptions.

No abortion may be performed upon an unemancipated minor or upon a female for whom a guardian has been appointed because of a finding of incompetency, until at least forty-eight hours after written notice of the pending operation has been delivered in the manner specified in this section. The notice shall be addressed to the parent at the usual place of abode of the parent and delivered personally to the parent by the physician or an agent. In lieu of such delivery, notice may be made by certified mail addressed to the parent at the usual place of abode of the parent with return receipt requested and restricted delivery to the addressee, which means a postal employee can only deliver the mail to the authorized addressee. If notice is made by certified mail, the time of delivery shall be deemed to occur at twelve o'clock noon on the next day on which regular mail delivery takes place, subsequent to mailing.

No notice is required under this section if:

(1) The attending physician certifies in the pregnant minor's medical record that, on the basis of the physician's good faith clinical judgment, a medical emergency exists that so complicates the medical condition of a pregnant female as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function and there is insufficient time to provide the required notice; or

(2) The person who is entitled to notice certifies in writing that he has been notified; or

(3) The pregnant minor declares, or provides information that indicates, that she is an abused or neglected child as defined in § 26-8A-2 and the attending physician has reported the alleged or suspected abuse or neglect as required in accordance with §§ 26-8A-3, 26-8A-6 and 26-8A-8. In such circumstances, the department of social services, the state's attorney and law enforcement officers to whom the report is made or referred for investigation or litigation shall maintain the confidentiality of the fact that she has sought or obtained an abortion and shall take all necessary steps to ensure that this information is not revealed to her parents.

SDCL 26-8A-2. Abused or neglected child defined.

In this chapter and chapter 26-7A, the term "abused or neglected child" means a child:

(1) Whose parent, guardian, or custodian has abandoned the child or has subjected the child to mistreatment or abuse;

(2) Who lacks proper parental care through the actions or omissions of the child's parent, guardian or custodian;

(3) Whose environment is injurious to the child's welfare;

(4) Whose parent, guardian or custodian fails or refuses to provide proper or necessary subsistence, supervision, education, medical care or any other care necessary for the child's health, guidance or well-being;

(5) Who is homeless, without proper care or not domiciled with the child's parent, guardian or custodian through no fault of the child's parent, guardian or custodian;

(6) Who is threatened with substantial harm;

(7) Who has sustained emotional harm or mental injury as indicated by an injury to the child's intellectual or psychological capacity evidenced by an observable and substantial impairment in the child's ability to function within the child's normal range of performance and behavior, with due regard to the child's culture; or

(8) Who is subject to sexual abuse, sexual molestation or sexual exploitation by the child's parent, guardian, custodian or any other person responsible for the child's care.
